Supreme Court, U.S.
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No. 10-348 SEP 9 2010

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In The

Supreme Court of the United States

JIANLIN ZHANG,

Petitioner,

v.

ERIC HOLDER,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Congress enacted the LIFE Act in December 2000, exempting all qualifying aliens from the restrictions against permanent residence under 8 USC 1255(a) and 8 USC 1255(c). The Tenth Circuit determined that a 1988 interim Agency regulation, specifically limited to 8 USC 1255(a), restricted qualified aliens from relief under the LIFE Act. Is the Tenth Circuit's decision in direct conflict with Supreme Court decisions in that it nullifies the Congressional statute and is contrary to the rules of statutory construction?

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FEDERAL REGISTER:

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Jianlin Zhang, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The order of the court of appeals (App. B, infra) is not reported. The order of the court of appeals denying rehearing en banc (App. A, infra) is not reported. The order of the Immigration Court (App. F, infra) and the Board of Immigration Appeals decisions (App. C & D, infra) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 2010. A petition for en banc rehearing before the Tenth Circuit was denied on June 14, 2010 (App. A, infra). The jurisdiction of this Court is invoked under 28 USC 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The First Amendment to the United States Constitution provides:

> *Section 1.* All legislative Powers herein granted shall be vested in a Congress of the

United States, which shall consist of a Senate and House of Representatives.

STATEMENT

The petitioner is a native and citizen of Fuijian Province, The Peoples Republic of China. He was admitted into the United States on January 9, 1995, as a K-1 fiancé. The United States citizen who originally filed his fiancé petition and the petitioner both intended to marry and live together as husband and wife. However, after the petitioner arrived in the United States and lived with his fiancé for a period of approximately six months, the fiancé changed her mind and did not marry the petitioner. The petitioner then remained continuously in the US and later married a different citizen of the United States, at Newkirk, Oklahoma, on February 20, 2001. This marriage continues and has produced two United States citizen children. The US Department of Homeland Security recognizes this marriage as valid and has approved an immigrant relative petition for him as the spouse of that US citizen. As his immigrant petition is approved, the US Department of State has an immigrant visa immediately available for his permanent residency.

A US Company filed an Application for Labor Certification for him on April 19, 2001, with the US Department of Labor. This qualifies him for the

benefits of the LIFE Act[1], 8 USC 1255(i). The LIFE Act is a distinct and separate method of applying for permanent residence that exempts qualified aliens from the restrictions to applying for permanent residence within the US that apply under 8 USC 1255(a). These exemptions include visa violators.

The petitioner applied for permanent residency under the LIFE Act with the US Department of Homeland Security based on his approved immigrant petition. The US Department of Homeland Security denied the application, declaring him a visa violator, due to his failure to marry the original fiancé that brought him to the US. Petitioner pointed out that he was applying under the LIFE Act, 8 USC 1255(i), and as such his application for permanent residency is exempt from that visa violation. The petitioner further explained to the US Department of Homeland Security that the restriction on applications for permanent residency for fiancé visa violators is at 8 USC 1255(d)[2] and, by its clear and specific language, is specificaily limited to applications for permanent residency under 8 USC 1255(a). But the US Department of Homeland Security denied his application under 8 USC 1255(a) – not 8 USC 1255(i).

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[1] Legal Immigration Family Equity Act, Public Law 106-553, 114 Stat. 276 (2000); and, Life Act Amendments of 2000, Public Law 106-554, 114 Stat. 2763 (2000).

[2] Immigration Marriage Fraud Amendments of 1986, Public Law 99-639, 100 Stat. 3537.

The US Department of Homeland Security then placed the petitioner in removal proceedings before the US Department of Justice's Immigration Court. The petitioner renewed his application for permanent residency before the Immigration Court under the LIFE Act (8 USC 1255(i)) and in the alternative asked for relief through Cancellation of Removal (8 USC 1299b). The Immigration Court denied both applications. The Immigration Court denied the application for permanent residency finding the petitioner eligible for permanent residence under 8 USC 1255(i) if the restriction as a visa violator under 8 USC 1255(d) could be overcome. The Immigration Court denied the application for cancellation of removal finding the petitioner did not meet the exceptional and extremely unusual hardship standard. The Immigration Court, finding the case sympathetic and that the petitioner had no criminal record, granted the petitioner voluntary departure.

The petitioner appealed the Immigration Court's decision to the US Department of Justice's Board of Immigration Appeals. The one judge panel of the Board of Immigration Appeals agreed with the Immigration Court and denied the appeal. The petitioner then filed a motion to reconsider with the Board of Immigration Appeals, which was denied.

The petitioner then petitioned for a review of the Board of Immigration Appeals decision with the Tenth Circuit Federal Court of Appeal. The Tenth Circuit found the petitioner's argument was "not without merit" But the three judge panel issued a

decision denying in part and dismissing in part. The panel denied the petitioner's argument on his eligibility for permanent residence under the LIFE Act, giving the benefit of the doubt to the US Department of Justice, as a matter of Agency discretion. The panel dismissed the petitioner's request for a ruling on the legal standard of exceptional and extremely unusual hardship, stating they had no jurisdiction to review this legal standard. The petitioner filed a petition with the Tenth Circuit for a rehearing en banc and this was denied.

The Immigration Court had jurisdiction under 8 USC 1229a(a)(1). The Board of Immigration Appeals had jurisdiction under 8 USC 1229a(c)(5). The Tenth Circuit Court of Appeals had jurisdiction under 8 USC 1252(a)(1).

REASONS FOR GRANTING THE PETITION

The Tenth Circuit's non application of the well established US Supreme Court rules of statutory construction warrants this Court's review. The nation must be able to draw comfort from the knowledge that the clear and unambiguous language of Congressional statutes, are applied as intended by Congress. If Agencies can apply their own deference that is manifestly contrary to the clear and unambiguous Congressional statutory language, they place their self interest over the clear and unambiguous statutes issued by Congress that represents the wellbeing of

our nation. This renders the lawmaking function of Congress pointless and would further render the decisions of the US Supreme Court on statutory construction null and void. Clear and unambiguous Congressional statutes as well as US Supreme Court decisions would no longer have the force of law. They would become subservient to Agency deference.

The Congressional statute under attack is the LIFE Act, this was enacted in 2000 and codified at 8 USC 1255(i), for the express purpose of exempting aliens from the normal restrictions prohibiting applications for permanent residence to keep families together, see *Padilla-Caldera v Gonzales*, 426 F.3d 1237 (10th Cir. 2006). The clear and unambiguous language of 8 USC 1255(i) specifically grants aliens a separate process to apply for permanent residence that is exempted from 8 USC 1255(a) and its restrictions, namely: "**Notwithstanding the provisions of subsections (a) and (c)**". The term **notwithstanding** is about as clear as one can get, it has no ambiguity.

A pre LIFE Act restriction to permanent residency that only applies to applications under 8 USC 1255(a) is that of alien fiancé visa violators (found at 8 USC 1255(d) and enacted in 1986). The limiting Congressional language of 8 USC 1255(d) is also clear and unambiguous: "The Attorney General may not adjust, **under subsection (a) of this section".** If Supreme Court precedents on statutory construction are followed, this restrictive language cannot be

applied to applications under 8 USC 1255(i) – and yet it is being applied.

The Tenth Circuit has examined the LIFE Act in depth including the legislative history; *Padilla-Caldera v Gonzales*, 426 F.3d 1237 (10th Cir. 2006). The legislative history states that the Congressional intent is to exempt visa violators from the restrictions applicable to applications under 8 USC 1255(a) and thereby keep families together.

The Congressional language is clear and unambiguous. The legislative intent of Congress is clear. Congress speaks directly to the subject in hand. There are no ambiguities or gaps left by Congress that need filling by Agency deference.

So what happens if the Tenth Circuit decision stands? Either some, or all, of the restrictions found under subsection (a) that Congress specifically wanted to be exempted with the LIFE Act would then apply. This then being the case, a class of alien is created, namely those who Congress sought to protect by statute but who are now subject to losing this protection as a matter of Agency self interest and with no rational basis to support this Agency action. US citizens would be separated from their alien family member – exactly what Congress sought to prevent. This Tenth Circuit decision nullifies the Congressional intent behind the LIFE Act as well as nullifying the Act itself.

This Tenth Circuit decision affects all aliens and their US citizen families through the US that seek

permanent residency under the LIFE Act both now and in the future. It is in direct conflict with the US Supreme Court's precedent decisions regarding on the rules on statutory construction.

A. The Tenth Circuit Decision Conflicts With US Supreme Court Decisions On Statutory Construction.

The US Supreme Court states that the clear and unambiguous language of Congressional statutes must be applied as written, *INS v St. Cyr*, 533 US 289 (2001); *INS v Phinpathya*, 464 US 183 (1984); *INS v Cardoza-Fonseca*, 480 US 421 (1987); *Chevron, USA Inc. v Natural Resources Defense Council*, 467 US 837 (1984).

The statute at 8 USC 1255(i), has clear, and unambiguous language. This language clearly states, "Notwithstanding the provisions of subsections (a) and (c)". So the restrictions in 8 USC 1255(a) cannot apply to an application under 8 USC 1255(i). Statutory language does not get much clearer than this.

The Tenth Circuit decided that the restriction to permanent residency for fiancé visa violators at 8 USC 1255(d) apply to applications for permanent residency under 8 USC 1255(i). But the clear and specific language of 8 USC 1255(d) states: "The Attorney General may not adjust, under subsection (a) of this section". So the restriction in 8 USC 1255(d) can only be applied to an application under 8 USC 1255(a). The specific clear and unambiguous

statutory language limits the applicability of this restriction to 8 USC 1255(a) – not 8 USC 1255(i).

The plain and unambiguous language of both pieces of legislation can have only one meaning – the restriction found in 8 USC 1255(d) cannot be applied to applications under 8 USC 1255(i). Thus, the Tenth Circuit has issued a decision in direct conflict with US Supreme Court decisions on statutory construction.

B. The Tenth Circuit's Application Of Agency Deference, Where The Statutory Language Is Plain And Unambiguous, Conflicts With Supreme Court Decisions.

The seminal US Supreme Court decision on when Agency deference should be applied is *Chevron, USA Inc. v Natural Resources Defense Council*, 467 US 837 (1984). The US Supreme Court holding in this case is that the plain meaning of the applicable statute should be applied as it is written; *Chevron* at 843-844. If the statute or the intent of Congress is clear, "that is the end of the matter, for the court, as well as the agency must give effect to the unambiguous expressed intent of Congress". *Chevron* at 842-843.

The US Department of Justice asked the court to apply the restriction to permanent residence for visa violators under 8 USC 1255(d) which was enacted in 1986 to block an application for permanent residence

under the LIFE Act which was enacted in 2000, at 8 USC 1255(i).

The petitioner pointed out the plain meaning of the statutes at 8 USC 1255(i) and 8 USC 1255(d) and asked the Tenth Court to apply the statutes as written. The US Department of Justice asked the Tenth Circuit to ignore the plain language of the statute and instead apply Agency deference. The request for deference was based on an interim Agency regulation that was written in 1988 to supplement 8 USC 1255(d) which was enacted in 1986[3]. There are no Agency regulations that have been issued since the passing of the LIFE Act to indicate that fiancé visa violators are not protected by the LIFE Act.

The Tenth Circuit then applied Agency deference – using the clear and unambiguous language of the year 1988 interim Agency regulation to prevent the application of the clear and unambiguous language of the year 2000 LIFE Act.

The Tenth's Circuit's application of Agency deference to issue a decision that runs contrary to the clear and unambiguous language of a statute conflicts with US Supreme Court decisions on the use of agency deference.

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[3] 53 Federal Register 30011-01, Wednesday August 10, 1988

C. The Tenth Circuit Decision Conflicts With US Supreme Court Decisions By Construing Immigration Statutes Narrowly In Favor Of The Government And Not The Alien.

The US Supreme Court states that in, removal proceedings, immigration statues must be construed narrowly in favor of the alien not the Government, *Leocal v Ashcroft*, 543 US 1 (2004); *INS v St. Cyr*, 533 US 289 (2001); *INS v Cardoza-Fonseca*, 480 US 421, 449 (1987); *INS v Errico*, 380 US 214, 225 (1996).

The Tenth Circuit decision looked at the immigration statutes found at 8 USC 1255(i), 8 USC 1255(a), and 8 USC 1255(d). The language in all three is clear and unambiguous. The Petitioner argued that the language of the statutes can only mean that the restrictions to permanent residence at 8 USC 1255(d) could not apply to an application for permanent residency under 8 USC 1255(i). The US Department of Justice asked the Tenth Circuit to find that the restrictions did apply to 8 USC 1255(i).

The statutory language in question states "Notwithstanding the provisions of subsections (a) and (c)" and "The Attorney General may not adjust, under subsection (a) of this section": 8 USC 1255(i) and 8 USC 1255(d) respectively.

The Tenth Circuit stated in its decision that "the petitioner's argument was not without merit". The Tenth Circuit then construed the statutory language

in favor of the US Department of Justice, finding that the restrictions to permanent residency at 8 USC 1255(d) applied to applications under 8 USC 1255(i).

The Tenth Circuit decision is in direct conflict with US Supreme Court decisions in that it construed the immigration statutes narrowly in favor of the government.

CONCLUSION

This petition for a writ of certiorari should be granted.

Respectfully submitted.

ARTHUR CAMPBELL COOKE

SEPTEMBER 2010

APPENDIX A
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

JIANLIN ZHANG

Petitioner,

v.

ERIC H. HOLDER, JR., United States Attorney General,

Respondent.

No. 09-9528
(Petition for Review)

ORDER AND JUDGEMENT*

(Filed Apr. 19, 2010)

Before **KELLY, BALDOCK,** and **HOLMES,** Circuit Judges.

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* After examining the briefs and appellate record, this panel has determined unanimously to grant the parties' request for a decision on the briefs without oral argument. *See* Fed. R. App. P. 34(f); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

The Board of Immigration Appeals (BIA or Board) affirmed an Immigration Judge's denial of Jianlin Zhang's applications for adjustment of Status and cancellation of removal and denied his motion for reconsideration. He petition's this court for review of the Board's denial of his motion for reconsideration. We dismiss in part and deny in part Mr. Zhang's petition for review.

Background

Mr. Zhang, a Chinese citizen, was admitted to the United States on January 9, 1995. He entered the United States as a nonimmigrant alien on a K-1 visa, solely to conclude a valid marriage to his fiancée, Sally Li, a United States citizen. Under the terms of his K-1 visa, Mr. Zhang was not permitted to remain in the United States for longer than ninety days, unless he married Ms. Li. Mr. Zhang never married Ms. Li, but remained in the United States without authorization, changing his address twice without notifying the Attorney General and working at various times without authorization. In February 2001, Mr. Zhang married a different United States citizen. He and his wife have two United States children.

The Department of Homeland Security placed Mr. Zhang in removal proceedings in 2006. He conceded removability and filed applications for cancellation of removal under 8 U.S.C. § 1229b(b), for adjustment of status under 8 U.S.C. § 1255(i), and for voluntary departure. Mr. Zhang presented evidence

in support of his claims at a hearing before an Immigration Judge (IJ). The IJ denied Mr. Zhang's applications for adjustment of status and cancellation of removal, but granted his request for voluntary departure. The BIA affirmed the IJ' decision and dismissed his appeal on November 10, 2008. Mr. Zhang did not file a petition for review. Instead, he filed a motion asking the Board to reconsider its decision, which the Board denied on April 20, 2009. He then filed a timely petition for review of the BIA's denial of his motion for reconsideration.

Jurisdiction and Standard of Review

This court has jurisdiction to determine its jurisdiction. *See Latu v. Ashcroft*, 375 F.3d 1012, 1017 (10th Cir. 2004). Our jurisdiction to review a final order of removal arises under 8 U.S.C. § 1252(a)(1), but a petition for review must be filed within 30 days after the date of the final order of removal, 8 U.S.C. § 1252(b)(1). Therefore, although Mr. Zhang purports to raise issues related to the BIA's order affirming the IJ's denial of his applications for adjustment of status and cancellation of removal, we do not have jurisdiction to review that decision because Mr. Zhang failed to file a timely petition for review. *See Infanzon v. Ashcroft*, 386 F.3d 1359, 1361 (10th Cir. 2004). We do have jurisdiction to review the Board's denial of Mr. Zhang's motion for reconsideration. *See id.* at 1361-62 (holding motions to reopen and reconsider are subject to judicial review and reviewing denial of motion to

reopen, despite lack of jurisdiction to review underlying order that was not timely appealed).

But our jurisdiction extends only to issue that would have been reviewable on appeal of the underlying order. *Cf. id.* at 1362. Here, Mr. Zhang's claims on appeal relate to his applications for cancellation of removal under 8 U.S.C. § 1229b and adjustment of status under 8 U.S.C. § 1255. While we are statutorily precluded from reviewing "any judgment regarding the granting of relief under" those sections, 8 U.S.C. § 1252(a)(2)(B)(i), we nonetheless have jurisdiction to review "constitutional claims or questions of law" regarding the BIA's denial of his applications, *id.* at § 1252(a)(2)(D).

We review the Board's denial of a motion for reconsideration for an abuse of discretion. *See Belay-Gebru v. I.N.S.*, 327 F.3d 998, 1000 n.5 (10th Cir. 2003). Legal error by the Board is "presumptively an abuse of discretion". *S. Utah Wilderness Alliance v. Bureau of Land Mgmt.*, 425 F.3d 735, 750 (10th Cir. 2005). We review the BIA's legal determinations de novo. *Lockett v. I.N.S.*, 245 F.3d 1126, 1128 (10th Cir. 2001).

Discussion

Mr. Zhang applied for two forms of relief from removal: adjustment of status to that of a lawful permanent resident alien, or alternatively, cancellation of removal. We address Mr. Zhang's claims regarding each of these applications in turn.

Adjustment of Status

In order to understand Mr. Zhang's argument regarding his application for adjustment of status, some background on the nature of his nonimmigrant status is helpful. He entered the United States as a nonimmigrant alien on a K-1 visa, as the "fiancé. . . . of a citizen of the United States. . . . who seeks to enter the United States solely to conclude a valid marriage with [his citizen fiancée]." 8 U.S.C. § 1101(a)(15)(K)(i).[1] For such an alien to obtain adjustment of status to that of a lawful permanent resident, he "must proceed through a detailed procedure involving six steps.: *Carpio v. Holder,* 592 F.3d 1091, 1093 (10th Cir. 2010). The first three steps – the citizen fiancée's petition for a K-1 visa for the alien fiancé; the alien fiancé's application for a K-1 visa; and the alien fiancé's entrance into the United States, *see id.* at 1093-94 – are not at issue in this case. To satisfy the fourth step, the engaged alien and citizen are required to marry within ninety days of the alien's entry into the United States. *See id.* at 1094; 8 U.S.C. § 1184(d)(1). After the marriage has occurred, the alien spouse must apply for adjustment of status of lawful permanent resident, *see Carpio,* 592 F.3d at 1094; 8 U.S.C. § 1255(a), (d), a status that will initially be granted only on a conditional basis, *see* 8 U.S.C. § 1186a(a)(1). At the sixth step, the

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[1] Section 1101(a)(15)(K)(i) nonimmigrant status applies to both male and female aliens and citizens. Because Mr. Zhang is male, we refer here to an alien fiancé and a citizen fiancée.

couple may petition to have the conditional basis of the alien's lawful permanent resident status removed. *See Carpio,* 592 F.3d at 1094; § 1186a(c)-(d).

An alien fiancé who does not satisfy the fourth step in the process, by marrying his citizen fiancée within ninety days of when he enters the United States, must depart the United States and is subject to removal if he does not do so. *See Carpio,* 592 F.3d at 1094; § 1084(d)(1). There is no dispute that Mr. Zhang did not marry Sally Li, the United States citizen who petitioned to accord him nonimmigrant status under § 1101(a)(15)(K)(i). Nor does he contend that he is eligible to seek adjustment of status as the fiancé of a United States citizen other than Ms. Li. Facing removal, he instead applied for adjustment of status under 8 U.S.C. § 1255(i), but the IJ and the BIA determined he is not eligible for relief under that subsection. He challenges the BIA's refusal to reconsider that decision as an error of law.

8 U.S.C. § 1255

Under 8 U.S.C. § 1255(a), an alien may apply to adjust his status to that of a lawful permanent resident. But only certain aliens are eligible for adjustment of status. Subsection (a) itself limits that relief to aliens who were inspected and admitted or paroled into the United States. *See id.* As relevant here, two other subsections of § 1255 list additional categories of aliens who are ineligible for relief under subsection (a). Section 1255(c) provides that subsection (a) is not

applicable to eight defined classes of aliens who have violated the terms of their nonimmigrant visas. Section 1255(d) precludes K-1 visa holders, like Mr. Zhang, from obtaining adjustment of status under subsection (a) on any basis other than marriage to a petitioning fiancée. Subsection (d) provides, in relevant part:

> The Attorney General may not adjust, under subsection (a) of this section, the status of a nonimmigrant alien described in section 1101(a)(15)(K) of this title except to that of an alien lawfully admitted to the United States on a conditional basis under section 1186a of this title as a result of the marriage of the nonimmigrant . . . to the citizen who filed the petition to accord that alien's nonimmigrant status under section 1101(a)(15)(K) of this title.

8 U.S.C. § 1255(d).

Mr. Zhang does not contend that he is eligible for adjustment of status under § 1255(a). He argues instead that the Attorney General has discretion to grant him adjustment of status under §1255(i), a separate subsection that permits certain aliens physically present in the United States to apply for that relief.[2] The IJ denied Mr. Zhang's application for

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[2] Mr. Zhang contends that he satisfies the requirements of § 1255(i) by (1) being physically present in the United States both at the time of his application and on December 21, 2000; (2) being within one of the otherwise-ineligible alien classes

(Continued on following page)

adjustment of status, holding that the Attorney General is precluded from granting him that relief except as permitted by § 1255(d). The IJ reasoned that the plain language of subsection (d) bars a K-1 visa holder from adjusting to permanent-resident status on any basis other than marriage to the citizen who petitioned on his behalf. The Board adopted and affirmed the IJ's decision and, in response to Mr. Zhang's motion for reconsideration, did not alter its holding.

The Board based its holding on decisions by the Ninth and Fourth Circuits that addressed a K-1 visa holder's eligibility to apply for adjustment of status under § 1255(i). In *Kalal v. Gonzales,* 402 F.3d 948 (9th Cir. 2005), the Ninth Circuit considered circumstances nearly identical to this case: the alien had entered the United States on a K-1 visa; she did not marry her petitioning United-States-citizen fiancé within ninety days of her arrival; she remained in the United States; and she later married a different United States citizen. *See id.* at 949-50. She nonetheless sought to avoid removal by applying for adjustment of status under § 1255. The court construed subsection (d) to preclude the Attorney General from

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enumerated in § 1255(c); and (3) being the beneficiary of an application for labor certification filed after January 14, 1998, but before April 30, 2001. *See* § 1255(i)(1) (A)(ii), (B)(ii), (C). Having held that he was ineligible for adjustment of status under § 1255(i) as a matter of law, neither the IJ nor the BIA determined whether Mr. Zhang sustained his burden to establish these facts.

granting her that relief. *See id.* at 951. As to her claim she could nonetheless apply for adjustment of status under § 1255(i), the Ninth Circuit examined the text of that subsection, which begins, "Notwithstanding the provisions of subsections (a) and (c) of this section. . . ." Noting the absence of any reference to subsection (d), the court reasoned that subsection (i) therefore only provides relief notwithstanding the restrictions stated in subsections (a) and (c), and therefore the restrictions on obtaining adjustment of status in subsection (d) remained in effect. *See id.* at 951-52.

Therefore, the court in *Kalal* concluded, a K-1 visa holder must still comply with The "specific restrictive process for holders of that kind of visa," and that § 1255(i) did not, on its face, create any exception to that "carefully crafted scheme that Congress created for the purpose of avoiding marriage fraud." *Id.* at 952. Because Ms. Kalal had not complied with the application statutory requirements, she was properly ordered removed. *See id.*; *see also Markovski v. Gonzales*, 486 F.3d 108, 110 (4th Cir. 2007) (following *Kalal* and holding that the plain language of § 1255(d) precluded a K-1 visa holder from adjusting status on any basis other than his marriage to the K-1 visa sponsor).

Mr. Zhang argues that the Board misconstrued §§ 1255(a), (d), and (i) to preclude him from applying for adjustment of status. This argument is properly before the court. *See Brue v. Gonzales*, 464 F.3d 1227, 1231 (10th Cir. 2006) (reviewing question of law

turning on interpretation of applicable statutory section).

Statutory Construction

"We begin by analyzing the plain language employed by Congress, and we must give words their ordinary or natural meaning." *Rosillo-Puga v. Holder*, 580 F.3d 1147, 1153 (10th Cir. 2009) (quotation omitted). There is an argument to be made that our sister circuits' construction of § 1255(i) is supported by the plain language of that subsection. It permits two clearly defined categories of aliens, who would otherwise be precluded from applying for adjustment of status under subsection (a), to apply for that relief outside of subsection (a) if they are physically present in the United States. The aliens eligible for relief under subsection (i) are those who are ineligible for adjustment of status under §1255(a) because (1) they entered the United States without inspection, *see* § 1255(i)(1)(A)(i); or (2) they fall into one of the eight classes of aliens listed in subsection (c), *see* § 1255(i)(1)(A)(ii). These aliens may apply for relief under subsection (i) "[n]otwithstanding the provisions of subsections (a) and (c)." § 1255(i)(1). As construed by the Ninth and Fourth circuits, this prefatory text is qualifying language, waiving for purposes of an application under subsection (i) only the restrictions in subsections (a) and (c), but not other restrictions, such as those in subsection (d). Indeed, subsection (i) makes no reference to subsection (d). Nor does it provide that the aliens specifically restricted from

adjustment of status by subsection (d) are eligible to apply for adjustment under subsection (i). Thus, there is no indication in subsection (i) of an intent to grant the Attorney General discretion to adjust the status of a K-1 visa holder under subsection (i). At best, such intent would be implicit. Under the Ninth and Fourth circuits' reading, subsection (i) explicitly sets aside two – but not all – of the bases for ineligibility under subsection (a), making them inapplicable under subsection (i). And K-1 visa holders must still pursue the adjustment of status under subsection (a), subject to the limitation of subsection (d).

Mr. Zhang counters that this construction of § 1255(i) is flawed because § 1255(d), on its face, only limits the Attorney General's discretion to adjust his status under subsection (a). He contends that, if he otherwise establishes eligibility under subsection (i), the Attorney General has discretion to adjust his status under that subsection, regardless of any limitations that would restrict his ability to obtain that relief under subsection (a). He asserts there was no reason for Congress to include subsection (d) in the "nothwithstanding" language in subsection (i), because, again, subsection (d) has no relevance except in applications under subsection (a). He argues further that the reference to subsection (a) in subsection (i) "exempts him from the requirements and prohibitions that may attach to an application for adjustment of status under [§] 1255(a)," Pet. Opening Br. at 16, apparently including even restrictions

imposed on subsection (a) applications by other subsections, such as subsection (d).

Neither our sister circuits' construction nor Mr. Zhang's construction is wholly without merit, and we are unable to conclude that the statutory language is clear and unambiguous with respect to whether a K-1 visa holder is restricted from obtaining adjustment of status under § 1255 except as provided in subsection (d). The Attorney General argues that the applicable regulations are consistent with the BIA's construction of the relevant provisions of § 1255 in this case and are entitled to *Chevron* deference. *See Chevron, U.S.A., Inc. v Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984). An agency's construction of a statute it administers may be owed deference by a court when the statute is ambiguous on the issue in question and the agency's reading represents a permissible construction of the statute. *See Rosillo-Puga*, 580 F.3d at 1153 (addressing Attorney General's construction of a separate section of Title 8); *Hernandez-Carrera v. Carlson*, 547 F.3d 1237, 1244 (10th Cir. 2008) (same).

In implementing 8 U.S.C. § 1255, the Attorney General promulgated 8 C.F.R. §§ 245.1 and 1245.1. Both regulations include the following language:

> (c) Ineligible aliens. The following categories of aliens are ineligible to apply for adjustment of status to that of a lawful permanent resident alien under section 245 of the Act:

. . . .

> (6) Any alien admitted to the United States as a nonimmigrant defined in section 101(a)(15)(K) of the Act, unless:
>
> (i) In the case of a K-1 fiancé(e). . . . , the alien is applying for adjustment of status based upon the marriage of the K-1 fiancé(e) which was contracted within 90 days of entry with the United States citizen who filed a petition on behalf of the K-1 fiancé(e)[.]"

8 C.F.R. §§ 245.1(c)(6)(i); 1245.1(c)(6)(i). Through these regulations, the Attorney General has construed 8 U.S.C. § 1255 to permit a K-1 visa holder to apply for adjustment of status only based upon marriage to the petitioning United States citizen fiancé(e). The agency's reading is reasonable and is a permissible construction of the statute. We therefore defer to the agency's construction, which is also consistent with that of the Ninth and Fourth circuits. *See United States v. Atandi*, 376 F.3d 1186, 1189 (10th Cir. 2004) (deferring to regulation as reasonable interpretation of statute and following other Courts of Appeals addressing same issue).[3]

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[3] Mr. Zhang's reliance on our decision in *Padilla-Caldera v. Gonzales*, 453 F.3d 1237 (10th Cir. 2005), is misplaced. That case involved ambiguity created within § 1255(i) because all applicants for adjustment of status under subsection (i) must be admissible, *see* § 1255(i)(2)(A), yet applicants who are eligible under § 1255(i)(1)(A) are also defined as *inadmissible* under 8 U.S.C. § 1182(a). *See Padilla-Caldera*, 453 F.3d at 1241; §§ 1182(a)(6),

(Continued on following page)

We conclude that Mr. Zhang is ineligible for adjustment of status under § 1255, except to that of an alien lawfully admitted to the United States on a conditional basis under 8 U.S.C. § 1186a as a result of a marriage to Sally Li, the citizen who filed the petition to accord him nonimmigrant status under 8 U.S.C. § 1101(a)(15)(K)(i). *See* 8 U.S.C. § 1225(d), 8 C.F.R, § 245.1(c)(6)(i). Because he failed to marry Ms. Li within ninety days of entering the United States, the BIA did not abuse its discretion in denying Mr. Zhang's motion for reconsideration with respect to its denial of his application for adjustment of status.

Cancellation of Removal

The BIA also affirmed the IJ's denial of Mr. Zhang's application for cancellation of removal under 8 U.S.C. § 1229b(b). In his motion for reconsideration, Mr. Zhang argued that the Board applied an incorrect legal standard. We have jurisdiction to review that claim. *See Brue,* 464 F. 3d at 1232 (holding court has jurisdiction to review "whether the BIA applied the

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(a)(9)(B)&(C). Thus, *Padilla-Caldera* addressed a conflict between two sub-parts of § 1255(i) and a separate statutory section, none of which are at issue in this case. Moreover, we noted in a later case that *Padilla-Caldera* was decided without the benefit of a subsequent BIA decision resolving the statutory ambiguity with respect to a different subsection of § 1182(a). *See Herrera-Castillo v. Holder,* 573 F.3d 1004, 1009 (10th Cir. 2009), *petition for cert. filed* (Jan. 25, 2010).

correct legal standing in making its determination" (quotation omitted)).

Under § 1229b(b)(1), Mr. Zhang was required to satisfy four criteria, only one of which is relevant here. He failed to establish that his removal " would result in exceptional and extremely unusual hardship to [his] spouse, parent or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence." § 1229b(b)(1)(D). Mr. Zhang contends that the BIA required him to prove an unconscionable level of hardship, thereby applying a heightened and erroneous legal standard. Based on our review of the record, however, it is clear that the Board applied the correct standard. *See* Admin. R. at 16 ("[W]e cannot find that the Immigration Judge erred in ruling that he failed to sustain his burden of proof with regard to establishing the 'exceptional and extremely unusual hardship' requirement."); *id.* at 17 ("In sum, even considering all of the factors presented cumulatively, we agree with the Immigration Judge's determination that the evidence of record does not indicate that whatever difficulties the respondent's qualifying relatives might face upon his removal to China would rise to the heightened exceptional and extremely unusual standard.").

The gist of Mr. Zhang's argument appears to be that, based on evidence he cites in his appeal brief, (but for which he did not provide citations in his motion for reconsideration), he established unconscionable hardship far exceeding the level required to qualify for cancellation of removal. But the point at

which hardship is exceptional and extremely unusual is not a legal standard. It is a judgment call subject to the Attorney General's discretion and therefore is not within our jurisdiction to review. *See Morales Ventura v. Ashcroft*, 348 F.3d 1259, 1262 (10th Cir. 2003). Therefore, we dismiss for lack of jurisdiction Mr. Zhang's petition for review, to the extent he challenges the Board's conclusion regarding his failure to establish the requisite level of hardship in support of his petition for cancellation of removal.

The petition for review is DISMISSED IN PART and DENIED IN PART.

Entered for the Court

Bobby R. Baldock
Circuit Judge

APPENDIX B

U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

5107 Leesburg Pike, Suite 2000
Falls Church, Virginia 22041

Cooke, Arthur Campbell
4516 E. 100th Street
Tulsa, OK 74137-0000

DHS/ICE Office of the Chief Counsel
4400 SW 44th Street, Suite A
Oklahoma City, OK 73119-2800

Name: ZHANG, JIANLIN **A072-796-854**

Date of this notice: 4/20.2009

Enclosed is a copy of the Board's decision and order in the the above-referenced case.

Sincerely,

Donna Carr
Chief Clerk

Enclosure

Panel Members:
Hess, Fred

U.S. Department of Justice
Executive Office for Immigration Review
Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A072 796 854 – Oklahoma City, OK

Date: APR 20 2009

In re: JIANLIN ZHANG

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT:
Arthur Campbell Cooke, Esquire

This case was last before us on November 10, 2008, when we discussed the respondent's appeal from the Immigration Judge's decision to deny his requests for adjustment of status and cancellation of removal. The respondent has now filed a timely motion to reconsider on December 9, 2008. *See* 8 C.F.R. § 1003.2(c)(2). The Department of Homeland Security (DHS) has not responded to the motion. The motion will be denied.

We find no reason to disturb our prior decision. *See* 8 C.F.R. § 1003.2; *see Matter of O-S-G-*,24 I&N Dec. 56 (BIA 2006); *Matter of Cerna,* 20 I&N Dec.399 (BIA 1991). In this motion, the respondent argues that the Board erred in failing to use the proper standard of review, failed to apply the plain meaning of the statute set forth at sections 245(a) and (i) of the Act, and failed in neglecting to apply appropriate case

law from the United States Court of Appeals for the Tenth Circuit. We find no merit to these arguments, and note that the respondent presented a different version of many of these arguments in his appeal brief. Inasmuch as the respondent does not identify specific error in our prior order, or call our attention to a change of law stated or relied upon in our earlier decision, the motion will be denied. *See Matter of O-S-G-, supra; Matter of Cerna, supra.*

ORDER: The motion is denied.

FOR THE BOARD

APPENDIX C

U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

5107 Leesburg Pike, Suite 2000
Falls Church, Virginia 22041

Cooke, Arthur Campbell
4516 E. 100th Street
Tulsa, OK 74137-0000

DHS/ICE Office of the Chief Counsel
4400 SW 44th Street, Suite A
Oklahoma City, OK 73119-2800

Name: ZHANG, JIANLIN A072-796-854

Date of this notice: 11/10/2008

Enclosure the Board's decision and order in the above-referenced case.

Sincerely,

Donna Carr
Chief Clerk

Enclosure

Panel Members:
Hess, Fred

U.S. Department of Justice
Executive Office for Immigration Review
Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A072 796 854 – Oklahoma City, OK

Date: Nov 10 2008

In re: JIANLIN ZHANG

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT:
Arthur Campbell Cooke, Esquire

APPLICATION: Adjustment; cancellation of removal

ORDER:

PER CURIAM. The respondent appeals from the September 4, 2007, decision of the Immigration Judge denying his application for adjustment of status under section 245(i) of the Immigration and Nationality Act, 8 U.S.C. § 1255(i), and for the cancellation of removal under section 240A(b) of the Act, 8 U.S.C. § 1229b(b). Upon review of the record of proceedings, we have concluded that the Immigration Judge's findings of fact have not been shown to be clearly erroneous, and we are not persuaded that his decision was otherwise in error. *See* 8 C.F.R. §§ 1003.1(d)(3)(i),(ii). Thus, we adopt and affirm the decision of the Immigration Judge. *See Matter of Burbano,* 20 I&N Dec. 872,874 (BIA 1994).

In reaching this conclusion, we separately note that we find no error in the Immigration Judge's determination that section 245(d) of the Act bars the respondent from adjusting his status under section 245(i). In this regard, we agree with the Immigration Judge's ultimate conclusion that the plain language of section 245(d) of the Act bars K-1 visa holders from adjusting to permanent resident status on any basis other than the marriage to the citizen who petitioned on their behalf. *See also, e.g., Kalal v. Gonzales,* 402 F.3d 948, 951 (9th Cir.2005) (rejecting attempt of K-1 visa holder to adjust his status based on marriage to a woman other than the one who filed the K visa petition for him); *Markovski v. Gonazales,* 486 F.3d 108, 110 (4th Cir.2007) (rejecting attempt of K-1 visa holder to adjust his status based on a petition submitted by a potential employer); *Choin v. Mukasey,* 537 F.3d 1116, 1120 n. 4 (9th Cir.2008).

With regard to the respondent's application for cancellation of removal, although he presents sympathetic circumstances, we cannot find that the Immigration Judge erred in ruling that he failed to sustain his burden of proof with regard to establishing the "exceptional and extremely unusual hardship" requirement. *See* 240A(b)(1)(D) of the Act, 8 U.S.C. § 1229b(b)(1)(D). In reaching this conclusion, we note that the Immigration Judge adequately considered all of the relevant factors in arriving at his conclusion, including the possibility of the family's separation from the respondent (I.J. at 15-16); the respondent's wife testified that she would remain in the United

States with the children if the respondent were returned to China (Tr. At 58).[1] In sum, even considering all of the factors presented cumulatively, we agree with the Immigration Judge's determination that the evidence of record does not indicate that whatever difficulties the respondent's qualifying relatives might face upon his removal to China would rise to the heightened exceptional and extremely unusual standard.

Because we agree with the ultimate conclusion in this case, we find no reason to disturb the Immigration Judge's decision. Accordingly, the respondent's appeal is dismissed.[2]

FURTHER ORDER: Pursuant to the Immigration Judge's order and conditioned upon compliance with conditions set forth by the Immigration Judge and the statute, the respondent is permitted to voluntarily depart from the United States, without expense to the Government, within 60 days from the date of this order or any extension beyond that time as may be granted by the Department of Homeland Security

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[1] As it does not appear that the respondent's wife would accompany him to China, we are not persuaded by the respondent's argument that she would suffer exceptional and extremely unusual hardship as a result of China's coercive population control policies. Moreover, even if she changed her mind and accompanied him to China, the respondent has failed to demonstrate that China's coercive population control policies would apply to a United States citizen.

[2] We also deny the respondent's request for oral argument. *See* 8 C.F.R. § 1003.1(e)(7)

(DHS). *See* section 240B(b) of the Immigration and Nationality Act; 8 C.F.R. §§ 1240.26(c), (f). In the event the respondent fails to so depart, the respondent shall be removed as provided in the Immigration Judge's order.

NOTICE: If the respondent fails to depart the United States within the time period specified, or any extensions granted by the DHS, the respondent shall be subject to a civil penalty of not less than $1,000 and not more than $5,000, and shall be ineligible for a period of 10 years for any further relief under section 240B and sections 240A, 245, 248, and 249 of the Immigration and Nationality Act. *See* section 240B(d) of the Act.

FOR THE BOARD

APPENDIX D

U.S. Department of Justice

Executive Office for Immigration Review

Immigration Court

---

700 E. San Antonio, Ave., Suite 675
El Paso, Texas 79901

Date: September 4, 2007.

File: A72-796-854.

In Immigration Removal Proceedings in the Matter of: JIANLIN ZHANG, Respondent.

Charge: Section 237(a)(1)(B), INA; Section 237(a)(3)(A), INA; and Section 237 (a)(1)(C)(i), INA.

Applications (3):

INA, Section 245(i), Adjustment of Status

INA, Section 240A(b)(1) – Cancellation of Removal

INA, Section 240B – Voluntary Departure

On Behalf of Respondent: Arthur Campbell Cooke, Esquire. 8145 East 17th Street Tulsa, OK 74112.

On Behalf of DHS/ICE: Thomas R. Murphy, Assistant Chief Counsel, Office of the Chief Counsel, Dallas, Texas.

WRITTEN DECISION AND ORDER OF THE IMMIGRATION JUDGE

I. PROCEDURAL HISTORY

The Respondent is a 34 year old married mail, native and citizen of China, with two children, ages 5 and 1. The Respondent's wife is a United States Citizen, as are his two children.

On September 6, 2006, the Department of Homeland Security/Immigration & Customs Enforcement charged the Respondent with being subject to removal from the United States to his native country and country of citizenship, China. During the course of the proceedings, the Respondent admitted the 12 allegations against him, and pled as follows to the charges of removal against him (Exhibit 1):

(1) The Respondent conceded that he was subject to removal pursuant to Section 237(a)(1)(B), INA as amended, in that after admission as a nonimmigrant under Section 101(a)(15) of the Act, he had remained in the United States for a time period longer than permitted, in violation of this Act or any other law.

(2) The Respondent conceded that he was subject to removal pursuant to Section 237(a)(3)(A), INA, as amended, in that he failed to comply with the provisions of Section 265 of the Act, by failing to notify the Attorney General in writing of your change

of address within ten days from the date of Such change.

(3) The Respondent conceded that he was subject to removal pursuant to Section 237(a)(1)(C)(i), INA, as amended, in that after admission as a nonimmigrant under Section 101(a)(15) of the Act, he failed to maintain or comply with the conditions of the nonimmigrant status under which he was admitted.

Sustaining of the Charge of Removal: Based on the Respondent's pleas, this Court sustained the 12 allegations and 3 charges of removal against the Respondent.

Relief: The Respondent provided that he would seek the reliefs of Adjustment of Status Pursuant to Section 245(i), INA, and Cancellation of Removal for a Nonpermanent Resident.

II. MOTIONS

The Government moved to pretermit the Respondent's application for Adjustment of Status. The Respondent's Brief in support of his application fro Adjustment of Status is provided below (Exhibit 3, Tab B).

Respondent's Brief

Mr. Jianlin, a national and citizen of China, wishes to acquire Lawful Permanent Resident Status. He is married to a United States citizen, has two United States citizen children, and has the benefit of INA 245(i) under the LIFE ACT. He seeks lawful permanent residence through adjustment of status as the spouse of a United States citizen under the LIFE ACT. Further, he has no previous removal orders, no criminal record, and seeks permanent residence either through adjustment under the LIFE ACT as the spouse of a United States citizen, or through Cancellation of Removal. Please find enclosed my G-28, immigration forms, the required filing fees, and documents in support of his I-130/I-485 application for permanent residence based on a marriage to a United States citizen under INA 245(i), Padilla-Caldera v Gonzales, 426 F.3d 1294 (10 Cir. 2005) as well as my EOIR-42B. If neither adjustment of status or cancellation of removal can be achieved then the respondent asks for voluntary departure.

Mr. Zhang was last admitted to the United States on January 9, 1995, as a fiancé pursuant to an approved visa petition filed by a United States citizen under the provisions of section 214(d) of the Act. The petitioner and beneficiary of the fiancé petition both intended to marry and live together as husband and wife. However, after Mr. Zhang arrived in the United States, the petitioning fiancée changed her mind and did not marry Mr. Zhang. Mr. Zhang remained in the US without non-immigrant status and then married

Vickie Ly, a citizen of the United States, at Newkirk, on February 20, 2001. Vickie Ly is not the petitioner of the original K-1 visa. This marriage has produced two United States citizen children. Mr. Zhang is also the beneficiary of an Application for Labor Certification that was filed on April 19, 2001 with the Department of Labor and he was physically present in the United States on December 20, 2000. Further, Mr. Zhang has no criminal record and has not departed the US since his arrival.

Mr. Zhang thus, respectfully submits that he is statutorily eligible to adjust his status under provisions of section 245(i) of the Act as read with the LIFE ACT of 2000 and with Padilla-Caldera v. Gonzales, 426 F.3d 1294 (10 Cir. 2005). He also respectfully submits that he is eligible for cancellation of removal.

Adjustment under INA 245(i), the LIFE ACT as read with the 10th Cir decision in Padilla-Calera

The LIFE ACT of 2000 reauthorized the benefits of INA 245(i). This allows a person who was in the United States and who had violated his status or entered the US without permission to adjust his status to lawful permanent residence upon payment of a $1,000.00 penalty. The underlying congressional intent in the LIFE ACT was to promote family unity and the LIFE ACT stands in direct conflict with certain provisions of the Immigration Act which would normally bar adjustment.

The 10th Circuit Court of Appeals is the Circuit Court that has jurisdiction over the Respondent and whose decisions apply in the above captioned matter. The 10th Circuit had in regard to one of these conflicts in the precedent decision of Padilla-Caldera v. Gonzales, 426 F. 3d 1294 (10 Cir. 2005). The court determined that where such contradictions occur, the court must resolve such a conflict with the cannons of statutory construction as stated in Watts v Alaska, 451 U.S. 259 (1981) & Smith v Robinson, 468 U.S. 84, 99 (2001). The Padilla-Caldera court found that conflicting statutes should be interpreted to give effect to each but allow the later statue to amend the earlier statue. Where the statutes are both specific, the plain language and circumstances of the later ACT should be given deference. The Circuit Court examined the LIFE ACT and determined that Congress had enacted it to promote family unity for illegal entrants and status violators who have other wise played by the rules.

The Respondent's case has such a conflicting statute. The Respondent is determined ineligible for adjustment under 245(d) and is yet determined to be eligible for adjustment under the LIFE ACT. The Respondent respectfully submits that the legal analysis of Padilla-Caldera applies directly to his case. The LIFE ACT is a later specific statute and it conflicts with INA 245(d) which is an older specific statute. It is also noted that INA 245(d) was specifically enacted to prevent marriage fraud and in that regard, the Respondent

respectfully submits that the Immigration Service has determined that there is no marriage and has approved the Respondent's I-130 immigrant petition based on his marriage to a US citizen.

The two statutes, INA 245(d) & INA 245(i) conflict in that INA 245(d) states that the Respondent cannot adjust while INA 245(i) says that the Respondent can adjust. Further, INA 245 (i) is a later conflicting statute and the Respondent is a status violator who has otherwise played by the rules and who is qualified for the benefits of INA 245(i).

The Immigration Service has taken note of his US citizen wife and children and approved an I-130 immigrant petition based on his US citizen family's immigrant petition. Further, as determined by the Circuit Court in Padilla-Caldera, the plain meaning of the LIFE ACT is to promote family unity.

Cancellation of Removal

The Immigration Service and the Respondent agree that the Respondent entered the United States in 1995 as a K-1 non-immigrant and has remained in the United States since that date. The Respondent has a second US citizen wife and two US citizen children. The approved I-130 shows that the Immigration Service has determined that the marriage is genuine and that the Respondent's spouse is a US citizen is enclosed. The relevant birth certificates, US citizenship certificate and marriage certificates are enclosed with the application. The Respondent has no criminal

record and there is no derogatory information that would lead to a finding of bad moral character. Thus, the only question left for the court to determine is the issue of exceptional and extremely unusual hardship.

The Board in Matter of Monreal 23 I&N 56 Dec. (BIA 2001), stated that while the standard of hardship in an Application for Cancellation of Removal is high, it is not so high as to rise to the level of being unconscionable. The Respondent respectfully submits that if his US citizen wife and children were required to move to China they would be subject to Chinese population control policies this rises to the level of exceptional and extremely unusual hardship and is recognized by the Board of Immigration Appeals as a ground for an asylum application. Further, in order to live in China they would have to take Chinese citizenship. This would defacto denaturalize the US citizen wife and children, in that they would lose the rights and protections US citizenship confers on them. They would also be regarded as second class citizens in China as they are not of Chinese birth. The Respondent respectfully submits that forced defacto denaturalization by the Immigration Court rises to the level of being unconscionable.

Respondent's Counsel.

GOVERNMENT'S TRAIL BRIEF ON CHARGES OF REMOVABILITY

Respondent Zhang is a native and citizen of China. On June 28, 1994, Sally Li a U.S. citizen filed a petition for a K-1 visa for him. On January 9, 1995, he was admitted to the U.S. as a non-immigrant K-1 in New York, New York. He was only authorized to remain in the U. S. until March 9, 1995, unless he married Sally Lie, the petitioner. He did not marry petitioner Sally Li, but remained in the U. S. without authorization. In June 1996, Respondent changed his address from Ridgewood, New York to Dallas, Texas and then in July 1998 changed his address from Dallas, Texas to Ponca City, Oklahoma, both times without notifying the Attorney General in writing within 10 days after obtaining the new addresses. During various periods from June 1996 to present, Respondent has worked without authorization. On February 20, 2001, he married Vickie Yen Ly, a U.S. citizen. He now has 2 U.S.C. children with her. On April 19, 2001, Lucky Star Restaurant filed a labor certification on his behalf which CIS denied on December 2, 2005. On May 26, 2006, Respondent filed an I-485 to adjust his status. On September 6, 2006, DHS denied his application to adjust status because he did not marry the original petitioner of his K-1 visa. On September 6, 2006, ICE filed an NTA against him charging him as removable under INA, Section 237(a)(1)(B), remaining in the U.S. for a time longer than permitted, Section 237(a)(3)(A), failing to notify the Attorney General of an address change, and

Section 237(a)(1)(C)(i), for failing to comply with the terms of his nonimmigrant K-1 visa since he failed to marry the petitioner of the visa within 90 days of his admission to the U.S. On March 27, 2007, the Respondent applied for cancellation of removal.

Respondent is Removable as Charged and Ineligible for Relief because he failed to marry the petitioner of his K-1 visa within 90 days of admission to the U.S.

Under INA, Section 101(a)(15)(K), an alien who receives a K-1 fiancé visa must to "conclude a valid marriage with the petitioner within ninety days after admission." If the alien does not marry the petitioner within 90 days, then the alien "shall be required to depart from the United States and upon failure to do so shall be removed in accordance with sections 240 and 241." INA, Section 214(d). If an alien fails to depart and tries to adjust his status to lawful permanent resident, INA, Section 245(d) provides that the "Attorney General may not adjust under subsection (a) that status of a nonimmigrant alien described in section 101(a)(15)(K) except to that of an alien lawfully admitted to the United States on a conditional basis under section 216 as a result of the marriage to the nonimmigrant . . . to the citizen who filed the petition to accord the alien's nonimmigrant status under section 101(a)(15)(K).:

Respondent Zhang asserts that he is elible to adjust under the LIFE Act as a beneficiary of a petition for

labor certification filed before April 30, 2001. The labor petition was denied on December 2, 2005. Respondent wishes to adjust under Section 245(i)(1)(B)(i)-(C), which provides that an alien beneficiary of a labor certification application filed after January 14, 1998 but before April 30, 2001 and who has been physically present in the United States since the enactment of the LIFE Act amendments on December 21, 2000, may apply to adjust after payment of $1,000.

The 9th Ciruit in 2005 addressed this very issue of a K-1 visa holder who married a different United States citizen that the petitioner of the K-1 visa. In Kalal v Gonzalez, the 9th Circuit found that Section 245(i) did not apply to K-1 visa holders for 2 reasons. 402 F.3d 948, 951(9th Cir. 2005). First, Congress decided to insert a specific provision in Section 245(d) that prevents K-1 visa holders from adjusting if they marry a U.S.C. other than the petitioner of the visa. Id. Second, Congress could have allowed K visa holders under the LIFE Act, but it decided not to undo the effects of subsection (d) in Section 245 (i). Congress specifically wanted to allow aliens in Section 245(a) and Section 245(c) to be able to adjust under Section 245(i) since Section 245(i) begins with the phrase, "[n]otwithstanding the provisions of (a) and (c)." Therefore, despite the provisions in (a) and (c), aliens can still adjust if they meet the criteria in Section 245(i). As the 9th Circuit explained, subsection (d), which applies to K-1 visa holders, is "[n]otably absent" in this opening exceptions provision in Section 245(i). Kalal, 402 F.3d 948, 951 (9th Cir.2005). Only (a) and

(c) are included. The 9th Circuit therefore found that Kalal could not adjust her status and was properly ordered removed. Id at 952.

Respondent Zhang also argues that the 10th Circuit's opinion in Padilla-Caldera v Gonzalez supports his position. 453 F.3d 1237 (10th Cir. 2005). This case addresses the adjustment of certain aliens under the LIFE Act amendments. The 10th Circuit clearly explained that the provisions of the LIFE Act amendments were designed for a narrow range of aliens.

(1) aliens present without being admitted or paroled under Section 212(a)(6)(A).

(2) aliens present after an aggregate period of illegal presence of over one year under Section 212(a)(9)(C)(i)(I) and

(3) aliens present after having reentered following an order of removal under Section 212(a)(9)(C)(i)(II). 453 F.3d at 1242, n.3.

The LIFE Act does not apply to K-1 visa violators, especially considering Congress adopted a specific provision prohibiting the adjustment of status of K-1 visa violators in Section 245(d).

Respondent Zhang also argues that Matter of Zampetis is applicable to his case because the BIA found than an alien who did not marry his K-1 visa petitioner could still adjust his status through his marriage to another U.S. citizen. 14 I&N 125 (BIA 1972). As the 9th Circuit pointed in Kalal, the BIA wrote this case before Congress wrote Section 245(d),

which specifically preludes the adjustment of K-1 visa holders who don't marry their visa petitioner. The 9th Circuit therefore held that this case no longer applies to a K-1 visa situation. 402 F.3d at 951.

Additionally, in Matter of Doel, the BIA agreed with the 9th Circuit in Kalal and held that a respondent who failed to marry his K-1 visa petitioner could not adjust under INA Section 245(d), which specifically precludes the adjustment of K-1 visa holders who don't marry their visa petitioner. The 9th Circuit therefore held this case no longer applies to a K-1 visa situation 402 F.3d at 951.

Additionally, in Matter of Doel, the BIA agreed with the 9th Circuit in Kalal and held that a respondent who failed to marry his K-1 visa petitioner could not adjust under INA, Section 245. A27 706 094, (BIA Dec. 23, 2005), 2005 WL 3709371. In Matter of Akpabio, the BIA refused to allow an alien to adjust her status to a lawful permanent resident based on her marriage to a U.S. citizen. She had entered on a K-1 visa and married the petitioner of the visa, but an Immigration Judge found that the marriage was fraudulent. Therefore, the BIA found that since she had never validly married the petitioner of her K-1visa, she could not adjust her status through her marriage to a different U.S. citizen because of the bar in Section 245(d). A73 546 683. (BIA Aug. 4, 2006), 2006 EL 3088769.

Therefore, even though USCIS approved the I-130 petition Zhang's wife made on his behalf, designating

that the marriage is valid, it does not matter because Zhang's current wife was not the original petitioner for his K-1 visa.

Conclusion

The Respondent is not eligible to adjust his status under Section 245(i) and the LIFE Act amendments because Section 245(d) specifically precludes K-1 visa violators from adjusting to LPR status. The Respondent is thus removable as charged for violating the terms of his K-1 visa, staying longer than permitted under his visa, and changing his address without notifying the Attorney General.

ICE, Assistant Chief Counsel

COURT'S RULING: Upon careful consideration of the arguments of both Parties, the facts of this case, and the applicable law, this Court finds, as asserted by the Government, that the Respondent is not eligible to adjust his status under 245(i) and LIFE Act amendments because Section 245(d) specifically precludes K-1 visa violators from adjusting to LPR status. This Court believes this ruling to be consistent with the findings of *Kalal v Gonzalez, Padilla-Caldera and Matter of Doel.*

Accordingly, this Court hereby pretermits the Respondent's application for Adjustment of Status.

This Court will now consider the Respondent's application for adjustment of status.

III. STATEMENT OF THE LAW

Cancellation of Removal and Adjustment of Status for Certain Nonpermanent Residents.

The Attorney General may cancel removal of, and adjust to the status of an alien lawfully admitted for permanent residence, an alien who is inadmissible or deportable from the United States in the alien:

(A) has been physically present in the United States for a continuous period of not less than ten years immediately preceding the date of such application;

(B) has been a person of good moral character during such period;

(C) has not been convicted of an offense under Section 212(a)(2), 237(a)(2), or 237(a)(3) (except in a case described in Section 237(a)(7) where the Attorney General exercises discretion to grant a waiver);

(D) establishes that removal would result in exceptional and extremely unusual hardship to the alien's spouse, parent or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence.

IV. EXHIBITS

Exhibit 1: Notice to Appear, dated September 6, 2006.

Exhibit 2: Government's Trial Brief on Charges of Removal, dated April 24, 2007.

Exhibit 3: Respondent's Brief in Support of Application for Adjustment of Status and Respondent's Application for Adjustment of Status.

Exhibit 4: Application for Cancellation of Removal (Form EOIR 42B).

Exhibit 5: Supporting Documents to Respondent's Applications.

V. TESTIMONY

A. During the course of the proceedings, the Respondent testified, substantially, as follows:

Direct Examination

The Respondent stated that he was born in Fujian Province in China. He worked as a cook there. He said that he now lives in Tulsa, Oklahoma. He lives with his wife and two daughters. His daughters are USC's, ages 5 and 2.

The Respondent stated that he had 9 years of education.

He said he came to the United States on a K-1 visa in 1994 (finace visa). He said that he lived with his fiance for six months and then she changed her mind. He has had no contact with her in a long time.

The Respondent said that he met his current wife in Tulsa, Oklahoma – and that he dated her for six months before marrying her.

The Respondent said that he would return to China if he had to, and that he would live in Fujian province.

The Respondent said that he did not want to go to China because he and his wife could not have any more children there because of the one child policy.

The Respondent further stated that on June 4, 1989, he was arrested for marching.

Cross-Examination

The Respondent said that he knew that he was supposed to return to China when he did not marry his first fiance with 90 days. He said that his first fiancée told him that it was okay to stay longer.

He further stated that he knew that he did not have permission to work in the United States, yet he did so. He said that he worked for many years.

The Respondent said that he and his wife do not make enough money to meet adjustment standards.

The Respondent said that he spends most of his time at home watching the children. He said that he and his wife just bought a home a year ago. He said that his children were born in Ponca City, Oklahoma.

The Respondent said that Medicaid had been used for one child.

He further stated that he just got work authorization.

The Respondent further stated that both of his parents are deceased. He further stated that he had a brother in China.

Redirect Examination

The Respondent said that his first fiance left him.

He further stated that his immigrant petition was filed by the Chinese restaurant he worked at. He said that the restaurant did not have sufficient business to justify his immigrant petition.

He said that he married his wife in 2001.

The Respondent stated that he currently ears $1,500 a month. He further stated that he owns a home worth $200,000 and that they have been in the home for about one year. The Respondent further stated that he owns a 1997 truck worth about $3,000. He also owns a 2001 Lexus.

Examination by the Immigration Judge

The Respondent said that he had never been arrested. The Respondent said that the hardship would be on his wife and children. He said that neither his wife or children have health issues.

The Respondent further stated that in China there are no human rights. He also stated that he speaks little English. He said that his children are being raised bilingual.

B. The Respondent's wife, Vickie Ly, testified, substantially, as follows:

The Respondent's wife stated that she was born in Vietnam. She is a naturalized US citizen. She is 40 years old.

She said that she moved to the United States when she was 12. She said that the rest of her family were USC's.

She said that in Feb of 2001, she married the Respondent. They were introduced by her sister-in-law.

The Respondent's wife stated that they have two children. She further stated that they have received state assistance from the state of Oklahoma. She said that they no longer receive assistance.

She said that she and her sister went to China in 2000. She was single at the time.

She said that there is a lot of stress in taking care of their children.

She stated that she had been a manager of a restaurant for about 5 years.

The Respondent's wife said that she was an accountant and that she has a degree.

She further stated that she could not go to China as she is Vietnamese and the living standards there are bad. She further stated that her children would

not get an education in China. She also said there was not medical system in China.

The Respondent's wife also stated that she wants more children.

The Respondent's wife said that she was a Buddhist.

She said that she makes $1,500 a month.

Cross Examination

The Respondent's wife said she came to the United States when she was 12. She is now 40.

She stated that she makes about $1,500 a month. She said that in 2005, they both made about $18,000.00 and that was together.

She said that she communicates in Cantonese to her husband. She further stated that they speak Cantonese to their children.

She said that she and the Respondent were struggling financially.

VI. LEGAL AND FACTUAL ANALYSIS

Congress created the relief of cancellation of removal under section 240A(b)(1) of Act as part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Division C of Public Law No. 104-208, 110 Stat. 3009-546. In order for an alien to

qualify for cancellation of Removal, the alien must establish that:

(A) he has been physically present in the United States for a continuous period of not less than ten (10) years immediately preceding the date of his application;

(B) he has been a person of good moral character during such period;

(C) he has not been convicted of an offense under section 212(a)(2), 237(a)(2), or 273(a)(3) of the Act; and

(D) his removal would result in an exceptional and extremely unusal hardship to his spouse, child or parent, who is a citizen of the United States or a lawful permanent resident, *See* INA, Section 240A(b)(1).

A. Ten Years Continuous Physical Presence in the United States.

Under Section 240A(b)(1)(A) of the Act, the respondent must show that he has been physically and continuously present in the United States for ten years preceding the date of his application for cancellation of removal. The ten year period of continuous physical presence ends "when the alien is served a notice to appear." *See* INA, Section 240A(d)(1). Moreover, the respondent must not have departed the United States for any period in excess of 90 days or

for any periods that in the aggregate exceeds 180 days. *See* INA, Section 240A(d)(2).

Court Finding: This Court will not deny the Respondent's application due to a lack of ten years of continuous physical presence in the United States.

B. Good Moral Character.

Under Section 240A(b)(1)(B), in order to be eligible for cancellation of removal, the respondent must also show that he has been a person of "good moral character" for not less than 10 years immediately preceding the date of his application.

Good moral character is a term of art defined under section 101(f) of the Act and includes seven enumerated actions or behaviors that disqualify an individual from qualifying for cancellation of removal, specifically providing that no person shall be found to have good moral character if it is established that the person: (1) is a habitual drunkard, (2) is inadmissible under various sections of 212(a) of the Act, (3) derives income principally from gambling, (4) has been convicted of two or more gambling offenses, (5) has given false testimony in order to obtain any benefits under the Act, (6) has been incarcerated for an aggregate period of more than six months, or, has been convicted of an aggravated felony. Further, section 101(f) allow the Court in its discretion to find a person to lack good moral character.

Court Finding: This Court will not deny the Respondent's application due to a lack of good moral character.

C. Criminal Convictions.

Another requirement that must be met in order to establish the respondent's eligibility for cancellation of removal is that he cannot have been convicted of an offense under section 212(a)(2),237(a)(2), or 237(a)(3) of the Act. *See* INA, section 240A9b)(1)(C).

Court Findings: No disqualifying convictions were presented at court.

D. Exceptional and Extremely Unusual Hardship.

As a final requirement to establishing eligibility for cancellation of removal, the respondent must show that his removal from the United States would result in an "exceptional and extremely unusual hardship" to his qualifying relatives. *See* INA, section 240A(b)(1)(D). In the instant matter, the respondent's **qualifying relatives are his USC wife and his two USC children**.

The Board of Immigration Appeals ("Board") has interpreted the "exceptional and extremely unusual hardship" requirement in three recent cases. In the first case, *Matter of Monreal,* the respondent was a 34 year old male, native and citizen of Mexico who was married with three U.S. citizen children. *Matter of*

Monreal, 23 I&N Dec. 56, 57 (BIA 2001). One of the respondent's children was an infant and the other two were ages 12 and eight. The children were in good health and the oldest child could fluently read, write, and speak both Spanish and English. *Id.* at 64. The respondent's wife, who was not eligible for cancellation of removal, voluntarily departed to Mexico shortly before the respondent's hearing on his application, and she took the infant child with her. The respondent's parents and seven of his eight siblings lawfully resided in the United States, with one sibling living in Mexico. *Id.* at 57. The respondent had been "gainfully employed" since his arrival to the United States. *Id.*

The Board in *Monreal* stated that in order to meet the "exceptional and extremely unusual hardship" test for cancellation of removal, an applicant "must demonstrate that his or her spouse, parent or child would suffer hardship that is substantially beyond that which would ordinarily be expected to result from the alien's deportation, but need not show that such hardship would be 'unconscionable.'" *Id.* at 56. In establishing elgibility, the Board further stated that "only hardship to the qualifying relatives, not to the applicant, himself or herself, may be considered." *Id.* The Board listed several factors to be weighted, namely the ages, health, and circumstances of the qualifying relatives, including "a child with very serious health issues, or compelling needs in school." *Id.* at 63. Moreover, "[a] lower standard of living or adverse country conditions in the country of return

are factors to consider only insofar as they may affect a qualifying relative." *Id.* Finally, the Board stated that "all hardship factors should be considered in the aggregate when assessing exceptional and extremely unusual hardship." *Id.* at 64.

In applying this standard, the Board held that the respondent in *Matter of Monreal* did not qualify for cancellation of removal. The Board stated that both the children and the respondent were in good health, and there was no evidence showing that the respondent would be unable to work and support his United States citizen children in Mexico. In fact, the respondent had a brother in Mexico who had worked in the same business as the respondent had for the past ten years in the United States. The Board also found that because the respondent's wife was already in Mexico with one of his children, the family would actually be reunited. *Id.* at 64. Furthermore, the Board stated that since the respondent's oldest child was fluent in Spanish, he would not suffer hardship in adjusting to life in Mexico. For these reasons, the Board held that even when considering all of these factors cumulatively, the respondent had not met his burden of establishing that his children or parents would suffer exceptional and extremely unusual hardship if he were removed. *Id.* at 65.

In the second case, *Matter of Andazola,* the Board further interpreted the meaning of the "exceptional and extremely unusual hardship." The facts of that case presented the respondent as a 30 year old woman who was a native and citizen of Mexico with two

children, ages 11 and six. The respondent stated that she was a single mother, although she lived with her significant other who was also the father of her children. *Matter of Andazola,* 23 I&N Dec. 319, 320 (BIA 2002). The respondent was employed, owned a house valued at $69,000, two vehicles valued at $12,000, and had $7,000 in savings. All of the respondent's siblings resided illegally in the United States and she had no children who could help her with her children. *Id.* The respondent stated that, if removed to Mexico, she was worried that she would be unable to find a job comparable to the job she had in the United States. She was also worried that her children would not be able to get "much education in Mexico, especially when they get older and reach the point where she would have to pay for it." *Id.* The oldest child did not speak "academic Spanish" and therefore might be placed in a lower grade in Mexico.

The Board in *Matter of Andazola* held that the respondent was not eligible for cancellation of removal because she did not meet the "exceptional and extremely unusual hardship" standard. The Board found that although the respondent's children may be deprived of the education available to them in the United States if they were relocated to Mexico, they would not be deprived of all schooling and would likely receive up to a ninth grade education in Mexico. *Id.* at 323. Furthermore, while the respondent did not have any family in Mexico, the Board held that it would not "consider the fact that the respondent's family is here illegally, rather than in Mexico, as a

factor that weighs in her favor." *Id.* Moreover, the Board found that the respondent was not a single mother because her significant other lived with her, provided financial support to their family, and could continue to help support the family while they were in Mexico. The Board also found that because the respondent had meaningful equity in her house, cars, $7,000 in savings, and a retirement fund, she would be able to establish a "new life in Mexico." *Id.* at 324. Finally, the Board held that because "the fact pattern presented [is] a common one, and the hardships the respondent has outlined are simply not substantially different from those would normally be expected upon removal to a less developed country." *Id.* at 324, the respondent had not met the "exceptional and extremely unusual hardship" standard and was therefore ordered removed to Mexico.

In the third case, *Matter of Recinas,* 23 I&N Dec. 467 (BIA 2002), the Respondent, a single mother who had no immediate family remaining in Mexico, provided the sole support for her six children, and had limited financial resources, established eligibility for cancellation of removal under Section 240A(b) of the Immigration and Nationality Act, 8 U.S.C., Section 1229b(b) (2002), because she demonstrated that her United States citizen children, who were 12, 11, 8 and 5 years old, would suffer exceptional and extremely unusual hardship upon her removal to her native country.

The factors included in assessing the hardship to the Respondent's children included the heavy burden

imposed on the Respondent to provide the sole financial and familial support for her six children if was deported to Mexico, the lack of any family in her native county, the children's unfamiliarity with the Spanish language, and the unavailability of an alternative means of immigrating to this county.

In sum, the Board has established the following criteria for determining an individual's eligibility for cancellation of removal based on the "exceptional and extremely unusual hardship" standard. The individual must demonstrate that her qualifying relatives would suffer hardship that is "substantially beyond that which would ordinarily be expected to result from the alien's deportation, but need not show that such hardship would be 'unconscionable.'" *Matter of Monreal,* 23 I&N Dec. 56, 57 (BIA 2001). Factors that may be taken into consideration by the Court include the ages, health, and surrounding circumstances of the qualifying relatives. Such surrounding circumstances include: (a) any compelling needs which the qualifying relatives may have in school in the United States; (b) the level of education available to the qualifying relatives in the country of return; (c) the amount of support (financial, emotional, psychological, or otherwise) available to qualifying relatives in the United States and in the country of return; (d) the respondent's available equity in the United States; (e) the adverse conditions or lower standard of living of the country of return in so far as they affect the qualifying relatives; and, (f) any other circumstances related to the respondent insofar as they affect the

qualifying relatives. Furthermore, these hardship factors must be considered in the aggregate so that no single factor need determinatively establish that the qualifying relatives will suffer exceptional and extremely unusual hardship.

This Court will not address the relevant hardship factors in this case.

In regard to the Respondent's wife and two children, ages 5 and 2, none have serious health issues. And in regard to the children, they are of preschool age, however, no learning disabilities or special learning requirements were presented.

The Respondent's wife speaks both Cantonese and English. She speaks to the Respondent in Cantonese. The children are being raised to speak both Cantonese and English. The Respondent speaks little English.

This Court notes that the Respondent's wife provided that she and the children would not return to China with the Respondent. Accordingly, they would go forward with their life in this country. That, of course, is their decision. However, the children are young, and should the Respondent be removed and his family return with him, they already speak Cantonese, as does the Respondent, and, seemingly would be able to adjust to their father's country of birth and citizenship.

The Respondent's wife has a college degree, works as a manager in a restaurant making $1,500 a month, and has several family members in this country living near her. She also is a co-purchaser of the home the family lives in a $200,000 home. She also has her own vehicle to drive. Accordingly, although she stated that the family is struggling financially, her economic situation, although not one without difficulty, is very similar to most of the cases this Court hears. In fact, her economic situation still allowed for her, with a co-purchaser, to acquire a $200,000 home. And, once again, the Respondent's wife and children do have family support living in the area near them.

The Respondent is young, in good health, and has a sibling living in China. He previously worked there as a cook, and there is no reason to believe that the Respondent could not do so again.

In sum, there are no serious health issues, no compelling school issues, the qualifying relatives will not leave this county – however, if they do they are bilingual, and there are family members both in the United States and China.

Aggregate Effects of Hardships.

Individually and cumulatively, the above factors compel the Court to find that the "exceptional and extremely unusual hardship" standard has not been met, because the respondent's qualifying relatives would not suffer hardship that is "substantially

beyond that which would ordinarily be expected to result from the respondent's deportation." *Matter of Monreal*, 23 I&N Dec. at 56.

VII. CONCLUSION

For this reason the Court finds that the Respondent is not eligible for cancellation of removal. Accordingly, the Respondent's application will be denied.

Additionally, this Court notes that during the course of the proceedings, the Respondent expressed concern about China's population control policy, and the impact it would have on he and his wife having more children beyond the two they already have. The Respondent did not file an asylum/withholding application. This Court specifically finds that the Respondent failed to provide any evidence that would support an asylum/withholding claim – including a failure to even present an application.

VIII. VOLUNTARY DEPARTURE

The Court may grant the discretionary relief of voluntary departure at the conclusion of a proceeding under section 240B of the Act if it finds the following: (1) the alien has been physically present in the United States for at least one year immediately preceding that date on which the Notice to Appear was served: (2) the alien has been a person of good moral character for at least five years preceding his application for

voluntary departure: (3) the alien is not deportable under sections 237(a)(2)(A)(iii) or 237(a)(4) of the Act; and, (4) the alien has established by clear and convincing evidence that he has the means to depart the United States and intends to do so. *See* INA, section 240B(b)(1).

Court's Finding: The respondent in this matter qualifies for voluntary departure because he has established the above requirements to the satisfaction of the Court. The respondent's request for voluntary departure will be approved in the exercise of the Court's discretion.

VIII. ORDERS

IT IS ORDERED that the Respondent's application for Adjustment of Status be and is **PRETERMITTED AND DENIED**.

IT IS FURTHER ORDERED that the respondent's Application for Cancellation of Removal and for Adjustment of Status for Certain Nonpermanent Residents under INA section 240(b)(1) be and is **DENIED**.

IT IS FURTHER ORDERED that the respondent's application for voluntary departure under INA section 240B be and is **GRANTED**.

The respondent is granted voluntary departure without expense to the government on or before **November 5, 2007,** or an extension beyond such date as may be granted by the District Director of the

Department of Homeland Security, and under such conditions as the District Director may direct.

IT IS FURTHER ORDERED that if the respondent fails to depart when and as required, the privilege of voluntary departure shall be withdrawn without further notice or proceedings and the following order shall thereupon become immediately effective: the respondent shall be removed from the United States to China on the charge contained in the Notice to Appear.

IT IS FURTHER ORDERED that the respondent shall post a voluntary departure bond in the minimum amount of $500 within five business days of the mailing of this order.

Warning to the Respondent: Failure to depart as required means that you could be removed. You may have to pay a civil penalty of US $1,000 to US $5,000 and you would become ineligible for voluntary departure, cancellation of removal, and any change or adjustment of status for ten years. If you fail to depart as required and then fail to comply with the removal order, you could also be find US $500 for each day of non-compliance.

Appeal: This decision is final unless an appeal is filed with the Board of Immigration Appeals with 30 calendar days of the date of the mailing of this written decision. Counsel for the Respondent reserved appeal at the conclusion of the Individual Hearing.

Date: September 4, 2007

Richard Randall Ozmun
Immigration Judge
U.S. DOJ/EOIR

Copy to:
Chief Counsel, BICE

APPENDIX E

U.S. Department of Homeland Security
4400 SW 44th Street, Suite A
Oklahoma City, OK 73119

U.S. Citizenship and Immigration Services

Jianlin Zhang
532 N. Sweetgum
Broken Arrow, OK 74012

Alien Number: A72 796 854
Date: SEP 06 2006

DECISION

Upon consideration, it is ordered that your application for status as a permanent resident be denied for the following reasons:

See Attachment(s)

Sincerely,

/S/

Barry C. Royce
Officer in Charge

Enclosure(s):

cc: Form I-291

Attachment to form I-291

Applicant: Jianlin Zhang
Application for Status of Permanent Resident,
Form I-485
Alien Number: A72 796 854
Application ID:

Your application is herby denied in accordance with Title 8, Code of Federal Regulations, Section(s) listed below:

8 CFR Reference: Part 245

The record shows that you are the spouse of a citizen of the United States and that you are the beneficiary of an approved visa petition submitted pursuant to Section 201(b) of the Immigration and Nationality Act, as amended (the Act).

On May 26, 2006 you filed a Form I-485, Application For Permanent Residence, seeking to have your immigration status adjusted to that of an alien lawfully admitted for permanent residence pursuant to Section 245 of the Act.

Section 245 of the Act provides in part:

> (a) The status of an alien who was inspected and admitted or paroled into the United States may be adjusted by the Attorney General, in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence if (1) the alien makes an application for such adjustment, (2) the alien is eligible to receive an immigrant visa and is admissible to the

> United States for permanent residence, and (3) an immigrant visa is immediately available to him at the time his application is filed. . . .
>
> (d) The Attorney General may not adjust, under subsection (a), the status of a nonimmigrant alien described in section 101(a)(15)(K) (relating to an alien fiancée or fiancé or the minor child of such alien) except to that of an alien lawfully admitted to the United States on a conditional basis under section 216 as a result of the marriage of the nonimmigrant (or, in the case of a minor child, the parent) to the citizen who filed the petition to accord that alien's non- immigrant status under section 101(a)(15)(K).

Title 8, Code of Federal Regulations, Section 245.1 states in part:

> (b) Ineligible Aliens. The following categories of aliens are ineligible to apply for adjustment of status to permanent residence under section 245 of the Act:
>
> (13) Any alien admitted to the United as a nonimmigrant fiancé as defined in Section 101(a)(15)(K) of the Act, unless the alien is applying for adjustment of Status based upon a marriage which was contracted within 90 days of entry with the United States citizen who filed a petition on behalf of the alien pursuant to section 214.2(k) of this chapter.

Section 101(a) of the Act states in part:

> (15) The term "immigrant" means every alien except an alien who is within one of the following classes o nonimmigrant aliens –
>
> (K) An alien who is the fiancée or fiancé of a citizen of the United States who seeks to enter the United States solely to conclude a valid marriage with the petitioner within ninety days after entry, and the minor children of such fiancée or fiancé accompanying him or following to join him;

The record reflects that on January 09, 1995, you were admitted to the United States at New York, New York as a nonimmigrant "K-1 fiancée." On February 20, 2001, you married Vickie Yen Ly at Newkirk, OK. A review of your records indicated that Vickie Yen Ly is not the United States citizen who petitioned to obtain your K-1 fiancée non-immigrant visa. In fact, the original petitioner, Shally Meixi Li, and you never married.

In light of the foregoing, it is concluded that you are statutorily ineligible for adjustment of status. Therefore, your application for permanent residence is denied.

This decision is made without prejudice toward the filing of a new application in the future. There are no provisions that allow for the appeal of this decision. However, there are provisions that allow for the filing of a motion to reopen/reconsider the denial of your application. Any motion to reconsider the denial of

your application **must be filed within 30 days** of the date of this notice. Any motion you filed must be submitted in writing to the address listed on the first page of this notice.

If you file a motion to reopen/reconsider on a denial based on cause, it must be submitted with the required filing fee. The fee amount can be found on the G-1055 fee schedule located on the following USCIS website. http://uscis.gov/graphics/formsfees/forms/files/g-1055.pdf

A motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence. A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decision to establish that the decision was based on an incorrect application of law or Service policy. A motion to reconsider a decision on an application must also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

Further, in accordance with Title 8, Code of Federal Regulations, § 274a.14(a)(iii), any employment authorization you may have obtained from this Service in connection with your application for adjustment of status is terminated. This termination is effective as of the date of this notice. Further unauthorized employment by you may result in you being ineligible for future immigration benefits.

APPENDIX F

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

JIANLIN ZHANG,
Petitioner,
v. No. 09-9528
ERIC H. HOLDER, JR.,
United States Attorney General,
Respondent.

ORDER

(Filed Jun. 14, 2010)

Before **KELLY**, **BALDOCK**, and **HOLMES**, Circuit Judges.

Petitioner's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court,

ELISABETH A. SHUMAKER, Clerk

SUPREME COURT, U.S.
FILED
OFFICE OF THE CLERK

No. 10-348

In the Supreme Court of the United States

JIANLIN ZHANG, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

NEAL KUMAR KATYAL
Acting Solicitor General
Counsel of Record
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QUESTION PRESENTED

Whether the court of appeals correctly afforded *Chevron* deference to an agency regulation establishing that petitioner is not eligible for the discretionary relief of adjustment of status except through marriage to the United States citizen who applied for a K-1 fiancé's visa on his behalf.

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In the Supreme Court of the United States

No. 10-348

JIANLIN ZHANG, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-16) is not published in the *Federal Reporter* but is reprinted in 375 Fed. Appx. 879. The decisions of the Board of Immigration Appeals (Pet. App. 18-19, 21-24) and of the immigration judge (Pet. App. 25-58) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 19, 2010. A petition for rehearing was denied on June 14, 2010 (Pet. App. 64). The petition for a writ of certiorari was filed on September 9, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Adjustment of an alien's status to that of a lawful permanent resident is governed by 8 U.S.C. 1255. Sec-

tion 1255(a) permits the Attorney General, in his discretion and under such regulations as he may prescribe, to adjust the status of an alien who was inspected and admitted or paroled into the United States to that of an alien lawfully admitted for permanent residence. The alien must apply, be eligible for an immigrant visa, and be admissible for permanent residence, and an immigrant visa must be immediately available to the alien at the time the application is filed. Section 1255(c) bars certain categories of aliens, including visa violators, from adjustment of status.

Section 1255(d) specifies the terms under which the Attorney General may grant adjustment of status to an alien who was admitted on a nonimmigrant visa as the fiancé or fiancée of a United States citizen.[1] Pursuant to Section 1255(d), such an alien's status may be adjusted only to that of a *conditional* resident, and only as a result of the alien's marriage to the United States citizen who filed the petition for a fiancé visa. See also 8 U.S.C. 1101(a)(15)(K)(i) (creating nonimmigrant alien classification for fiancés who seek admission solely for the purpose of marriage within 90 days); 8 U.S.C. 1186a (providing for conditional permanent resident status); 8 C.F.R. 214.2(k)(1)-(6) (requirements for application for K-1 fiancé visa). The marriage must be timely per-

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[1] Section 1255(d) was enacted as part of legislation to bar, with certain exceptions, adjustment of the status of aliens admitted as nonimmigrant fiancés. See Immigration Marriage Fraud Amendments of 1986, Pub. L. No. 99-639, §§ 2(e), 3(b), 100 Stat. 3542; see also Immigration Technical Corrections Act of 1988, Pub. L. No. 100-525, § 7(b), 102 Stat. 2616 (adding the provision permitting adjustment to conditional permanent resident).

formed within 90 days of the alien's entry. 8 C.F.R. 245.1(c)(6)(i); 8 C.F.R. 1245.1(c)(6)(i).[2]

Section 1255(i) permits certain aliens who are present in the United States without having been inspected and admitted or paroled, and certain visa violators, to adjust their status under specified circumstances. That subsection provides that "[n]otwithstanding the provisions of subsections (a) and (c) of this section, an alien physically present in the United States * * * may apply to the Attorney General for the adjustment of his or her status to that of an alien lawfully admitted for permanent residence" under certain conditions. 8 U.S.C. 1255(i)(1). As relevant here, Section 1255(i) permits an alien to apply if he is rendered ineligible for adjustment of status by Section 1255(c); is the beneficiary of an application for a labor certification properly filed on or before April 30, 2001; and was physically present in the United States on December 21, 2000, if the application for labor certification was filed after January 14, 1998. 8 U.S.C. 1255(i)(1)(A)(ii), (B)(ii) and (C). The alien must apply and pay the applicable fee; he must be both eligible to receive an immigrant visa and admissible for permanent residence; and a visa must be immediately available at the time of the application. 8 U.S.C. 1255(i)(1) and (2). Precisely the same eligibility requirements for

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[2] The regulation relevant to this case previously appeared at 8 C.F.R. 245.1(b)(13) (1989). See 53 Fed. Reg. 30,011 (1988). Following the enactment of Section 1255(i), the relevant regulation was moved to its present location. See 59 Fed. Reg. 51,095 (1994); pp. 10-11, *infra*. When the Department of Homeland Security (DHS) was created, responsibility for Section 245.1 was transferred from the Department of Justice to DHS, and a new but identical regulation, 8 C.F.R. 1245.1, was promulgated to cover adjustment-of-status proceedings before immigration judges and the Board of Immigration Appeals.

adjustment of status appear in Section 1255(a), except for having been inspected and admitted or paroled into the United States.[3]

2. a. Petitioner, a native and citizen of China, was last admitted to the United States on January 9, 1995, on a "K-1" nonimmigrant visa, which permits the admission of a fiancé solely for the purpose of marriage within 90 days. He neither married nor departed the United States within 90 days, and he never married the United States citizen listed on his visa. He violated the conditions of his visa by failing to depart within the 90 days, by changing his address without notifying the Attorney General, and by working without authorization. Pet. App. 2.

In February 2001, petitioner married his current spouse, who is a United States citizen but who is not the person listed as the fiancée on the visa under which petitioner was admitted to the United States in 1995. Pet. App. 2. In April 2001, an application for labor certification, with petitioner as the beneficiary, was filed with the Department of Labor.[4] *Id.* at 33.

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[3] Section 1255(i) was originally adopted in 1994 and was amended in 1997. Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1995, Pub. L. No. 103-317, § 506(b) and (c), 108 Stat. 1766 (1994); Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1998, Pub. L. No. 105-119, § 111(a) and (b), 111 Stat. 2458 (1997). See also pp. 11-12, *infra* (noting 2000 amendments not relevant here).

[4] To obtain adjustment of status based on employment, a Form I-140 Immigrant Petition for Alien Worker must be submitted on the alien's behalf, attaching the Department of Labor's certification of the labor requirement. Although the Department of Labor certified the labor requirement on behalf of petitioner, Administrative Record 428, United States Citizenship and Immigration Services denied an employment-

b. In 2006, petitioner filed an application for adjustment of status. Pet. App. 33. The application asserted that petitioner was eligible to apply based on the filing of the 2001 application for labor certification and that he was eligible to receive adjustment of status because an immediate-relative visa is available to him. Petitioner is an immediate relative of a United States citizen based on his 2001 marriage. Administrative Record (A.R.) 396.

In September 2006, United States Citizenship and Immigration Services, a component of DHS, denied the application for adjustment of status. Pet. App. 59-63. The application was denied because, under 8 U.S.C. 1255(d) and 8 C.F.R. 245.1(c), petitioner is barred from adjusting his status to that of a lawful permanent resident except by timely marrying the fiancée listed on his visa, which he did not do. Pet. App. 62.

c. Also in September 2006, United States Immigration and Customs Enforcement commenced removal proceedings against petitioner. Pet. App. 26. Petitioner admitted the factual allegations in the Notice to Appear and conceded that he is removable as an alien who is present in the United States in violation of the law (8 U.S.C. 1227(a)(1)(B)), as an alien who failed to maintain the conditions of his status (8 U.S.C. 1227(a)(1)(C)(i)), and as an alien who failed to timely update his registration address (8 U.S.C. 1227(a)(3)(A)). Pet. App. 26-27. Petitioner sought relief in the form of adjustment of status under Section 1255(i). *Id.* at 27-31; A.R. 361-366.[5] Petitioner also applied for voluntary departure under

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based petition on petitioner's behalf in 2005. Pet. App. 33, 35. Petitioner has never obtained an employment-based visa.

[5] Petitioner also sought cancellation of removal under 8 U.S.C. 1229b(b); the denial of that relief is not at issue here.

8 U.S.C. 1229c(b) if he were denied relief from removal. See Pet. App. 25, 56.

d. In September 2007, in a written decision, Pet. App. 25-58, the immigration judge (IJ) found petitioner removable as charged, *id.* at 27, and pretermitted his application for adjustment of status. The IJ ruled that petitioner is not eligible to adjust his status to that of a lawful permanent resident because, having violated the terms of his K-1 visa, he is barred by Section 1255(d) from adjusting his status to that of a lawful permanent resident. *Id.* at 38. The IJ granted petitioner's application for voluntary departure. *Id.* at 56.

3. The Board of Immigration Appeals (BIA) adopted and affirmed the IJ's decision. Pet. App. 20-24. The BIA separately noted its agreement that Section 1255(d) bars K-1 visa holders from adjusting status on any basis other than marriage to the citizen who petitioned on their behalf. *Id.* at 22. That conclusion, the BIA noted, is consistent with several appellate decisions. *Ibid.* (citing *Kalal* v. *Gonzales*, 402 F.3d 948 (9th Cir. 2005), *Markovski* v. *Gonzales*, 486 F.3d 108 (4th Cir. 2007), and *Choin* v. *Mukasey*, 537 F.3d 1116, 1120 n.4 (9th Cir. 2008)).

4. Petitioner did not timely seek judicial review of the BIA's decision, but instead moved the BIA for reconsideration. See Pet. App. 3. The BIA denied reconsideration. *Id.* at 17-19. Petitioner then filed a petition for review of the BIA's decision to deny reconsideration. See generally *Stone* v. *INS*, 514 U.S. 386, 405-406 (1995).

5. The court of appeals denied the petition for review in an unpublished decision. Pet. App. 1-16.

The court of appeals noted that petitioner concededly was barred from obtaining adjustment of status under Section 1255(a), because he did not comply with the re-

quirements set out in Section 1255(d) for a K-1 visa holder to adjust status upon his timely marriage to the fiancée who sponsored the visa. Pet. App. 5-7. Petitioner argued, however, that he could obtain adjustment of status under Section 1255(i) notwithstanding the bar imposed by Section 1255(d). *Id.* at 7. The court of appeals rejected that argument.

The court of appeals noted that the governing regulations, 8 C.F.R. 245.1(c)(6)(i) and 1245.1(c)(6)(i), clearly prohibited petitioner from applying for adjustment of status, because he was admitted to the United States as a nonimmigrant fiancé on a K-1 visa but then did not timely marry the fiancée who filed the visa petition for him. Pet. App. 12-13. Accordingly, for petitioner to prevail, he would have to establish that the regulations were not entitled to *Chevron* deference. *Id.* at 12.

The court of appeals concluded that the regulations permissibly construe the statute and do not contravene the plain statutory language. The court noted that two other courts of appeals had read the statute as the regulations do. Pet. App. 8-9 (citing *Kalal*, *supra*, and *Markovski*, *supra*). Those decisions are based on the prefatory language of Section 1255(i), which provides that the Attorney General may adjust status under that subsection "[n]otwithstanding" the restrictions of "subsections (a) and (c)," but makes no reference to subsection (d), the provision that bars petitioner from seeking adjustment of status. *Id.* at 10-11. Thus, under that reading, "subsection (i) explicitly sets aside two—but not all—of the bases for ineligibility under subsection (a)," so that K-1 visa holders are still "subject to the limitation of subsection (d)." *Id.* at 11; see also *id.* at 9 (a K-1 visa holder must still comply with the "'specific restrictive process for holders of that kind of visa,'" and

8 U.S.C. 1255(i) "did not, on its face, create any exception to th[e] 'carefully crafted scheme that Congress created for the purpose of avoiding marriage fraud'") (quoting *Kalal*, 402 F.3d at 952).

The court acknowledged that petitioner's contrary reading—that Section 1255(d) restricts only adjustment under Section 1255(a), and that adjustment under Section 1255(i) is not adjustment under Section 1255(a)—was not "wholly without merit." Pet. App. 12. But the court of appeals concluded that the statute did not "clear[ly] and unambiguous[ly]" compel that reading, as would be necessary to hold the governing regulations invalid. *Ibid.* Because the statute was ambiguous and the Attorney General's reading was a permissible one, the court of appeals afforded *Chevron* deference to the regulations. *Id.* at 12-13. Petitioner therefore is ineligible to seek adjustment of status. *Id.* at 14.

5. The court of appeals denied rehearing en banc, with no judge calling for a poll. Pet. App. 64.

6. Pursuant to the IJ's order granting voluntary departure, petitioner had until January 8, 2009, to depart from the United States. See Pet. App. 21, 23-24; 8 U.S.C. 1229c(b)(2). We are informed by DHS that petitioner has not departed from the United States.

ARGUMENT

The unpublished decision of the court of appeals is correct and does not conflict with any decision of this Court. Petitioner does not contend that the decision below conflicts with any decision of another court of appeals, and indeed, every published decision on the subject to date has read the statute as the governing regulations do. And for independent reasons, petitioner is

now ineligible for the relief that he seeks. Further review therefore is not warranted.

1. As the court of appeals explained, petitioner can prevail only if the governing regulations are contrary to the plain language of the statute and therefore not entitled to *Chevron* deference. Petitioner contends (Pet. 7) that his reading of the statute is unambiguously correct because the contrary reading "nullifies" Section 1255(i). That contention lacks merit.

Petitioner's submission rests on the language in Section 1255(d) stating that "[t]he Attorney General may not adjust" the status of an alien in his position "under subsection (a) of this section." He contends (Pet. 6, 8-9, 11) that Section 1255(i) creates its own procedure for awarding adjustment of status and that Section 1255(d) does not by its terms restrict applications under Section 1255(i). But if that reasoning were correct, the first words of Section 1255(i)(1)—"Notwithstanding the provisions of subsections (a) and (c) of this section"—would be deprived of any meaning. Section 1255(c), by its terms, specifies classes of aliens to whom "subsection (a) of this section shall not be applicable." If Section 1255(i) created its own adjustment procedure, completely independent of Section 1255(a), then there would be no need to provide that the new procedure is "[n]otwithstanding the provisions of subsections (a) and (c)." But Congress *did* so provide, and it conspicuously did *not* provide that Section 1255(i) would operate "[n]otwithstanding" the procedure for fiancés holding K-1 visas set out in Section 1255(d). See *Kalal* v. *Gonzales*, 402 F.3d 948, 951-952 (9th Cir. 2005); accord *Markovski* v. *Gonzales*, 486 F.3d 108, 110 (4th Cir. 2007).

Furthermore, Section 1255(d) was enacted in 1986 and amended in 1988 as part of repeated and "carefully

designed" efforts by Congress to combat marriage fraud by aliens. *Kalal*, 402 F.3d at 952; see note 1, *supra*. An alien who enters the United States with the avowed intent of marrying a citizen must fully and timely comply with those rules; if he does not, he is ineligible for adjustment, and if he does, he is eligible only for *conditional* adjustment. Petitioner "abided by none of the restrictions, and now suggests that [he] can avoid them entirely—no need to marry h[is] fiancé[e] within 90 days; no need to marry h[er] at all, actually; and no need to obtain a legal CLPR [conditional lawful permanent resident] status as those who follow the law must." *Kalal*, 402 F.3d at 952. The care with which Congress crafted the provisions to prevent immigration through fraudulent marriages further supports the court of appeals' conclusion that petitioner's reading—which would permit the "flouting" of those provisions, *ibid.*—is not unambiguously correct.

2. Petitioner also suggests (Pet. 10) that the court of appeals should not have relied on the regulation to resolve the perceived ambiguity, on the theory that the regulation was not "issued since the passing of the LIFE Act."[6] That contention is incorrect.

As noted above, Section 1255(i) was enacted in 1994. See note 3, *supra*. After Congress adopted that provision, the Department of Justice revised its regulations to implement Section 1255(i) and to address its interaction with the previously existing rules for adjustment of status. The new regulations made clear that "Section [1255(i)] also does not waive several other grounds of ineligibility for adjustment of status under [8 U.S.C.

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[6] Petitioner does not offer any other reason why the regulation would not be subject to deference if the statute is ambiguous.

1255]. * * * An applicant who was admitted to the United States as a K-1 fiance(e) but did not marry the United States citizen who filed the petition * * * is also barred from adjusting status under section [1255]." 59 Fed. Reg. 51,093 (1994). Some pre-existing grounds of ineligibility for adjustment of status were left in 8 C.F.R. 245.1(b); those grounds do *not* apply to aliens applying under Section 1255(i). See 59 Fed. Reg. at 51,095. The regulatory provision at issue here, however—which had been 8 C.F.R. 245.1(b)(13) (1994)—was moved into a new 8 C.F.R. 245.1(c), which provides that aliens in the listed categories "are ineligible to apply for adjustment of status to that of a lawful permanent resident alien under section [1255]," including Section 1255(i). 59 Fed. Reg. at 51,095. That provision was subsequently replicated in 8 C.F.R. 1245.1(c). See note 2, *supra*. Petitioner's characterization of the rule as dating from 1988, before the enactment of Section 1255(i), therefore is inaccurate. In fact, the regulation expressly considered and resolved the question presented here about the intersection of Section 1255(d) and (i).

Although petitioner repeatedly refers to Section 1255(i) as part of a 2000 statute known as the LIFE Act (Pet. 2-3, 4, 5, 6, 7-8, 9-10), that characterization is erroneous. The statute to which petitioner refers is the Legal Immigration Family Equity Act (LIFE Act), Pub. L. No. 106-553, App. B, Tit. XI, 114 Stat. 2762A-142.[7] The LIFE Act itself did not amend Section 1255(i) at all.

Although the related LIFE Act Amendments of 2000, Pub. L. No. 106-554, App. D, Div. B, Tit. XV, 114 Stat. 2763A-324, made some changes to Section 1255(i),

[7] See also Act of Dec. 21, 2000, Pub. L. No. 106-553, § 1(a)(2), 114 Stat. 2762 (enacting the LIFE Act and other legislation by incorporation).

those amendments are not relevant to petitioner's case or to the question presented.[8] The LIFE Act Amendments extended the deadline to file a qualifying application for a labor certification. § 1502(a)(1)(B), 114 Stat. 2763A-324. That extension made petitioner's application timely, but it did not otherwise affect his eligibility for adjustment of status. The LIFE Act Amendments also added Section 1255(i)(1)(C), which requires that the applying alien have been physically present in the United States on the date of enactment of the LIFE Act Amendments. § 1502(a)(1)(D), 114 Stat. 2763A-324. That provision did not affect petitioner at all. Neither change made by the LIFE Act Amendments to Section 1255(i) is at all relevant to the interaction of Section 1255(d) and (i).

3. Petitioner also errs in contending (Pet. 11) that the decision below overlooked the rule that immigration statutes must be interpreted narrowly in favor of aliens in removal proceedings. In the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, Congress has expressly conferred on the Attorney General the authority to resolve ambiguities in the first instance. 8 U.S.C. 1103(a)(1); see *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 424-425 (1999). The Attorney General's interpretations are reviewed under the *Chevron* framework. See *ibid.* By contrast, if the mere finding of a statutory ambiguity were sufficient to compel a holding in the alien's favor, the Attorney General would have no such interpretive authority. A court thus properly may consider whether statutory ambiguities should be resolved in favor of the alien only after the court has used every interpretative

[8] See also Consolidated Appropriations Act, 2001, Pub. L. No. 106-554, § 1(a)(4), 114 Stat. 2763 (2000) (enacting the LIFE Act Amendments and other legislation by incorporation).

tool at its disposal, including application of deference principles under *Chevron* and *Aguirre-Aguirre*. The principle petitioner invokes does not establish that a statute is so unambiguous that deference is unwarranted. See *Negusie* v. *Holder*, 129 S. Ct. 1159, 1164 (2009). Thus, in *Negusie*, this Court identified an ambiguity in the INA, but notwithstanding the alien's invocation of the rule of lenity, this Court remanded the case to the BIA to resolve the ambiguity under *Chevron*. See *id.* at 1164, 1167-1168. The court of appeals therefore did not err in resolving any ambiguity by according *Chevron* deference to an on-point regulation.

Even in the criminal context, application of the rule of lenity requires more than "[t]he simple existence of some statutory ambiguity"; it requires a "grievous ambiguity" such that, "after seizing everything from which aid can be derived," the Court "can make no more than a guess as to what Congress intended." *Muscarello* v. *United States*, 524 U.S. 125, 138-139 (1998) (internal quotation marks and citation omitted). If that approach were applicable in the immigration context, there is no such "grievous ambiguity" in Section 1255, especially given the cross-reference in Section 1255(i) to Subsections (a) and (c) but not (d), and the history of Subsection (d). See pp. 9-10, *supra*; accord, *e.g.*, *Markovski*, 486 F.3d at 110 (deeming the answer to the question presented by this case "evident from the plain language of the statute").

4. Even if petitioner had been eligible to seek adjustment of status under Section 1255(i) in removal proceedings, his subsequent conduct has rendered him ineligible for adjustment of status for independent reasons. Petitioner sought and received permission to depart voluntarily. "Voluntary departure * * * allows the

Government and the alien to agree upon a *quid pro quo*." *Dada* v. *Mukasey*, 554 U.S. 1, 11 (2008). By departing voluntarily, the alien both avoids potentially extended detention pending removal and is excused from some of the penalties associated with deportation. The government, in return, gains the benefit of "a prompt and costless departure"—but that benefit is "lost" if the alien "stay[s] in the United States past the departure date," *e.g.*, "to wait out the adjudication" of subsequent motions that do not toll the departure period. *Id.* at 19-20. For that reason, if an alien overstays the voluntary departure period, he is penalized by (inter alia) losing eligibility to seek adjustment of status under Section 1255 for ten years. See 8 U.S.C. 1229c(d)(1)(B); 8 C.F.R. 1240.26(a). There is no exception for adjustment of status under Section 1255(i). See *ibid.*

Petitioner was required to depart by January 8, 2009. We are informed by DHS that he has not done so. See p. 8, *supra*. Nor did petitioner withdraw his request for voluntary departure during the departure period. See *Dada*, 554 U.S. at 21, 22-23. Rather, in his motion for reconsideration, petitioner asked for "suspension" of his "voluntary departure date." A.R. 10. The BIA did not grant the request; such a suspension would allow an alien to retain the benefits of voluntary departure but deprive the government of any corresponding benefit by extending the time well beyond the statutory maximum. See 8 U.S.C. 1229c(b)(2); 8 C.F.R. 1240.26(f); *Dada*, 554 U.S. at 19-20.[9] Petitioner therefore is subject to a ten-

[9] The motion for reconsideration did not itself toll the voluntary departure period. *Dada*, 554 U.S. at 19. In regulations that took effect after petitioner had overstayed his voluntary departure period, the Department of Justice now provides that an alien who files a reconsideration motion within the departure period is deemed to have withdrawn

year prohibition on obtaining adjustment of status. Consequently, even if this Court were to resolve the question presented in his favor, petitioner still could not obtain the relief he seeks.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 2010

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his request for voluntary departure and therefore is no longer subject to the penalties for overstaying the voluntary departure period. 8 C.F.R. 1240.26(e)(1); see also *Dada*, 554 U.S. at 20 (noting the pendency of this regulation). The amendment does not apply retroactively to motions that, like petitioner's, were filed before the amendment took effect. See 73 Fed. Reg. 76,935 (2008).

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No. 10-348

In The

Supreme Court of the United States

JIANLIN ZHANG,

Petitioner,

v.

ERIC HOLDER,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF FOR THE PETITIONER IN REPLY

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The Respondent incorrectly raises voluntary departure penalties as a point not raised or addressed in the petition for a writ.

The Supreme Court Rule 15.6 allows a reply brief from the Petitioner when the Respondent's brief in opposition raises a new point not previously raised in the petition for a writ. The Respondent has raised such a point in his brief in opposition to the petition. The Petitioner thus submits this reply brief to address this new point raised by the Respondent.

The new point the Respondent raises is: the penalties rising from a failure to depart under a grant of post hearing voluntary departure, 8 USC 1229c(b)(3) and 8 USC 1229c(d)(1). This new point is however not applicable, as the petitioner is not subject to any penalties for failure to depart under a grant of post hearing voluntary departure.

In order to be subject to grant of post hearing voluntary departure the Immigration Court must state that the voluntary departure is contingent upon the payment of a $500.00 voluntary departure bond. Thus the foreign national must accept the voluntary departure by paying the voluntary departure bond within 5 days of the Immigration Court's order, 8 USC 1229c(b)(3), *In re Jose Dario Diaz-Ruacho*, 24 I&N Dec. 47 (BIA 2006). If this bond is not paid the contingency is not complied with and there is no voluntary departure, or penalties for failure to depart, *In re Jose Dario Diaz-Ruacho*, 24 I&N Dec. 47 (BIA 2006).

I have confirmed with the Petitioner that the required $500.00 voluntary departure bond payment was never paid. The Petitioner, believing in the legal correctness of his case, chose to forego voluntary departure and sought appellate relief instead. Thus, the voluntary departure bond was not paid by the Petitioner and the voluntary departure offered by the Immigration Court never took effect. Further, the Immigration Court never advised the petitioner of the contingent nature of the voluntary departure bond nor the consequences for failure to post the required voluntary departure bond. Thus voluntary departure never took effect. As the voluntary departure never took effect there can be no penalty for failure to depart. The Board of Immigration Appeals clearly states that:

> We find that the posting of a voluntary departure bond is a condition precedent to permission to depart voluntarily at the conclusion of a removal proceeding. We therefore conclude that an alien who fails to meet the voluntary departure bond requirement is not subject to the penalties of section 240B(d)(1) of the Act.

In re Jose Dario Diaz-Ruacho, at 47, 51.

Dada v. Mukasey is not applicable as the Petitioner is not subject to the effect of an order of voluntary departure. *In re Jose Dario Diaz-Ruacho*, 24 I&N Dec. 47 (BIA 2006); *Dada v. Mukasey*, 554 US 1 (2008).

If this Honorable Court rules in favor of the Petitioner, the Immigration Court will hear the

Petitioner's application for permanent residence status. There is no ten year bar to adjustment as the Respondent erroneously alleges. Petitioner is eligible to adjust his status to lawful permanent status in the Immigration Court.

The Respondent erroneously raises the new point of a voluntary departure bar to adjustment. This does not apply to the Petitioner. As such, this should, with respect, be ignored as a non-relevant distraction. The only real issue that stands before this Honorable Court is that of the legislative language of 8 USC 1255(i) which states "notwithstanding section a and c". The Respondent erroneously asks the US Supreme Court to uphold the Tenth Circuit decision that this language means – "including section a but excluding section c". The Petitioner correctly asks this Honorable Court to find this language means – "excluding section a and excluding section c".

For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

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